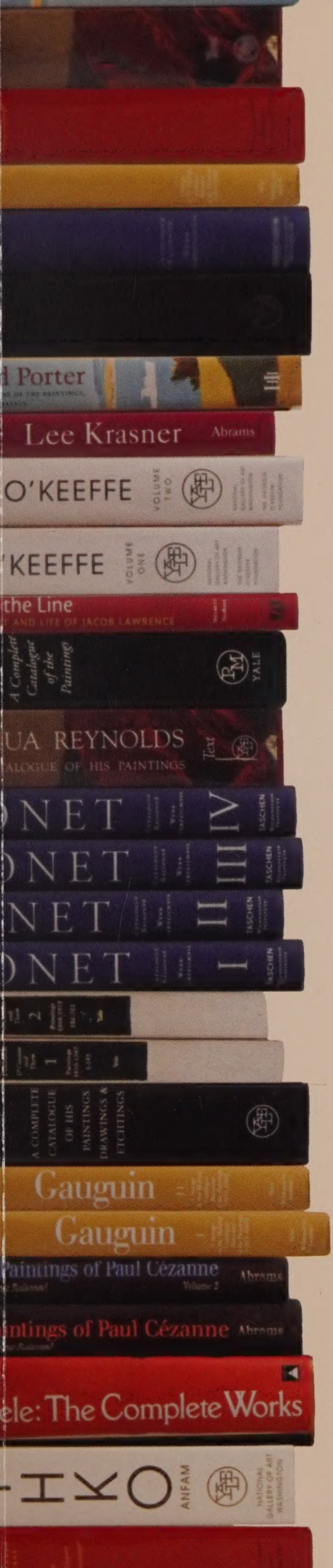
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VOLUME 8 NOS. 3 & 4 2006

IFAR Journal

INTERNATIONAL FOUNDATION FOR ART RESEARCH

CATALOGUES RAISONNÉS *and the* AUTHENTICATION PROCESS

WHERE THE IVORY TOWER MEETS THE MARKETPLACE

♻ Recycled Paper

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DAVID
The Subject Pictures Catalog

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IFAR Journal
INTERNATIONAL FOUNDATION FOR ART RESEARCH

PROCEEDINGS OF AN IFAR CONFERENCE ON

CATALOGUES RAISONNÉS and the AUTHENTICATION PROCESS

WHERE THE IVORY TOWER MEETS THE MARKETPLACE

A LETTER FROM THE EXECUTIVE DIRECTOR OF IFAR 4

WHAT *IS* A CATALOGUE RAISONNÉ? 5

EDITED PROCEEDINGS:

CATALOGUES RAISONNÉS AND THE AUTHENTICATION PROCESS

WHERE THE IVORY TOWER MEETS THE MARKETPLACE

AN IFAR CONFERENCE • DECEMBER 14-15, 2001

DAY ONE

RIGHT OR WRONG, REAL OR FAKE: WHO CARES? 6
SAMUEL SACHS II

PROCEDURES & PROCESS

INTRODUCTION 9
NANCY MOWLL MATHEWS
MODERATOR

METHODS OF RESEARCH: CASE STUDIES FROM THE WARHOL CATALOGUE RAISONNÉ 11
NEIL PRINTZ

ESTABLISHING RELIABLE EVIDENCE 18
SARAH FAUNCE

21 THE KANDINSKY CATALOGUE RAISONNÉ
VIVIAN ENDICOTT BARNETT

24 PARTNERSHIPS BETWEEN CONSERVATORS AND ART HISTORIANS IN THE CREATION OF CATALOGUES RAISONNÉS
JOYCE HILL STONER

29 Q & A

WHO JUDGES THE EXPERTS?

INTRODUCTION 32
GRACE H. GLUECK, MODERATOR

JUDGING THE EXPERTS 34
PETER C. SUTTON

THE VIEW FROM THE AUCTION HOUSE 40
JOHN L. TANCOCK

46 DROIT MORAL AND AUTHENTICATION OF WORKS IN FRANCE
VAN KIRK REEVES

50 Q & A

DAY TWO • MORNING SESSION

GETTING PUBLISHED — AT WHAT COST?

INTRODUCTION 52
NANCY MOWLL MATHEWS, MODERATOR

THE PUBLISHERS' VIEWPOINT 53
ELAINE STAINTON AND PAUL ANBINDER

58 THE ROLE OF THE ARTISTS RIGHTS SOCIETY (ARS)
THEODORE H. FEDER

61 Q & A

LEGAL LIABILITY FOR GIVING OPINIONS

INTRODUCTION 64
THEODORE N. KAPLAN, MODERATOR

DEFAMATION, DISPARAGEMENT AND MALPRACTICE 65
STEVEN MARK LEVY

ARE OPINIONS DANGEROUS THINGS 70
O GIVE? SUITS AGAINST THE POLLOCK-KRASNER AUTHENTICATION BOARD
RONALD D. SPENCER

74 INSULATING YOURSELF FROM LIABILITY
PETER R. STERN

77 INSURANCE FOR ART SCHOLARS AND WRITERS
ELLEN HOENER ROSS

80 Q & A

DAY TWO • AFTERNOON SESSION

ETHICS & POTENTIAL CONFLICTS OF INTEREST

SPONSORSHIP AND THE INEVITABILITY OF CONFLICTS 89
JACK COWART, MODERATOR

A MUSEUM CURATOR'S PERSPECTIVE 94
ARTHUR K. WHEELOCK, JR.

99 GEORGIA O'KEEFFE CATALOGUE RAISONNÉ AND THE CAA'S CODE OF ETHICS FOR ART HISTORIANS
BARBARA BUHLER LYNES

104 Q & A

POST-RESEARCH: DEALING WITH THE FIELD

IFAR'S CATALOGUE RAISONNÉ SURVEY 110
SHARON FLESCHER

A SCHOLAR'S PERSPECTIVE: THE EDWARD HOPPER CATALOGUE RAISONNÉ 117
GAIL LEVIN

122 THE NEEDS OF THE MARKETPLACE
MICHAEL FINDLAY

126 CONFERENCE SUMMATION
THEODORE E. STEBBINS, JR.

A LETTER FROM SHARON FLESCHER

Executive Director, IFAR; Editor-in-chief, *IFAR Journal*

Dear *IFAR Journal* Readers:

This special issue of *IFAR Journal* is devoted to the proceedings of a major two-day conference organized by IFAR in December 2001 on *Catalogues Raisonnés and the Authentication Process: Where the Ivory Tower Meets the Marketplace.* Why, you might ask, was it important to organize that conference and why delay the publication until now?

Let me tackle the latter question first. It was always our intention to publish the conference proceedings, but it became a more daunting task than initially anticipated. Only a few of the 25 conference participants submitted written talks. This meant transcribing and editing the talks and the q&a that followed all but the last session and working closely with the speakers – all busy professionals – on the editing process. It also took time to analyze responses (many, alas, handwritten) to a detailed questionnaire that IFAR designed for catalogue raisonné authors in conjunction with this conference, and whose results we included in this publication. Not insignificantly, funding was fully expended organizing the conference. Publication thus got put on the back burner. A grant from the Dedalus Foundation enabled us to resurrect the project and bring this special publication to you.

As to why we organized the conference in the first place and why it merits publication, the answer, we believe, is simple: Catalogues raisonnés are crucial research tools for the art field but are increasingly plagued by controversy over who should produce them; who should fund them; what standards and methodologies need be applied to avoid even the perception of arbitrary decision-making or conflicts of interest; and what protections against legal liability can be afforded the scholars who author them.

Several incidents prior to the conference highlighted the need to reexamine these issues, and IFAR conceived of organizing a broad-based conference to begin a dialogue to address them. As an organization long involved with authentication and trusted by both the users of catalogues raisonnés and the scholars who produce them, IFAR believed, and others agreed, that we provided the appropriate neutrality, objectivity and scholarship to tackle the subject. The Catalogue Raisonné Scholars Association (CRSA) and the Council of Artist Foundations offered their cooperation. IFAR is grateful to these organizations and their leaders, Nancy Mowll Mathews and Jack Cowart, respectively, for their help.

To the best of our knowledge, no program on this scale devoted to catalogues raisonnés had ever been organized prior to this IFAR conference, although IFAR itself had hosted several programs on the general subject. As early as 1986, for example, we organized an *IFAR Evening* on “The Catalogue Raisonné – Critical Issues,” and we devoted another *IFAR Evening* in 1998 to “The Challenges of the Catalogue Raisonné.”

In traditional IFAR fashion, we compiled a conference Resource Packet that was distributed gratis to attendees and made available to non-attendees at nominal cost. We hope that the Packet (still available) and this Journal will become valued reference tools for an important issue affecting the art world.

ACKNOWLEDGMENTS: It is impossible to organize a large-scale conference and publication without the help of many people. First, and certainly most important, are the speakers whose names appear on the following pages. We were honored that so many distinguished specialists agreed to participate. Thanks, too, to Gail Aronow, Kathleen Ferguson, Margot Hensler, Megan Sewright, Isabel Stainow Wilcox, and Gertrude Wilmers for their help to me in transcribing and editing the talks and tabulating the questionnaire. I have already mentioned Nancy Mathews and Jack Cowart. Regarding funding, IFAR received support for the conference from both the Samuel H. Kress Foundation and the Roy Lichtenstein Foundation. We received additional generous support for this publication from the Dedalus Foundation. A heartfelt and sincere “thank you” to all.

THOUGHTS ON CATALOGUES RAISONNÉS WHAT *IS* A CATALOGUE RAISONNÉ?

kȧ tȧ lō̂g′ re zō̂ nā′

[Fr, literally, reasoned catalog] (Webster's)

[Fr., = carefully studied or methodical catalogue.] A descriptive catalogue arranged according to subjects, or branches of subjects; hence *gen*. or loosely, a classified or methodical list. (OED)

"A catalogue raisonné by definition is a descriptive systematic list."
SAMUEL SACHS

"This construct of the "raisonné," which is defined as reasoned, rational, right, just, sensible, argued, considered, and weighed, can fall victim to every known aspect of our all-too-human condition."
JACK COWART

"The decision of genuineness is being made by a person or group of people who claim to arrive not at 'absolute truth' but at the best informed and reasoned 'opinion' that can be formed at this moment in history."
NANCY MOWLL MATHEWS

"Catalogues raisonnés are based on the evidentiary procedures of art history — clues from the archives; the verbal testimony of those who were there; and above all the material record of the work itself."
NEIL PRINTZ

"It is this concept of argument from evidence that I think is basic to the procedures of composing a catalogue raisonné."
SARAH FAUNCE

"Any author of a catalogue raisonné bears responsibility for determining which works are authentic and therefore included."
GAIL LEVIN

"The existence of detailed and reliable catalogues raisonnés is a boon to the art market."
MICHAEL FINDLAY

RIGHT OR WRONG, REAL OR FAKE: WHO CARES?

SAMUEL SACHS II*

At the end of the day, authenticity, I believe, is the central concern of catalogues raisonnés. They are with us largely to stamp out forgery and misrepresentation, and equally so, errors of scholars, or even, you might say, misguided hunches. Museums, dealers, collectors, and artists all benefit from the labors of the scholar. I am reminded of the scholar, painter, and teacher Max Leibermann, who invited his painting students to create an exhibition of their works to be shown to and judged by the neighboring school of art historians. Predictably, the young art historians trashed the show, and the following morning, the painters were duly upset. Liebermann said: "Boys, be kind to the art historians, for one day it is they who will prove that you did not paint your worst pictures."

The authors of catalogues raisonnés, the artists, and their families seek to establish the *oeuvre* of the artist – the truth – and with proof of authorship comes the gold standard of scholarship. The benefits of their work go to the widows, the artists, the dealers, the public at large, and by extension to art history itself. A catalogue raisonné by definition is a descriptive systematic list. Catalogues are often dry, but they are essential. And most importantly, they are not cast in stone. Recently, you may have read about a reattributed Monet formerly attributed to John Singer Sargent. This is quite a stretch. Equally interesting is the dictatorship of the "cataloguiste." François Duret-Robert in the *Connaissance des Arts* (1989, no.448) spoke of the cataloguiste as though she caused the sun to shine or the rain to pour in the paintings' market. The effect of inclusion or exclusion from a catalogue will be touched upon, I am sure, many times at this conference.

"Catalogues are often dry, but they are essential. And most importantly, they are not cast in stone."

The earliest examples of trying to order our knowledge go back to Greek and Roman problems. The Romans heartily and happily copied Greek sculpture, and in many cases it is difficult to tell which is which. Often the early catalogues are not useful for identification, and certainly not at all for history. It was Vasari who began modern art history in an attempt to systematize our knowledge. He is most famous for the *Lives of the Artists*.[1] The book, which aimed to illuminate the inner recesses of artistic character, was not, narrowly speaking, a catalogue raisonné. Vasari was followed by Karel van Mander, who was often referred to as the "Dutch Vasari." His *Schilder-boek* (1603-4) was and still is a central resource for information on northern European painters of the fourteen and fifteen hundreds.

---

* Samuel Sachs II is President of the Pollock-Krasner Foundation, Inc., Director Emeritus of The Frick Collection, and the former director of the Detroit Institute of Arts and the Minneapolis Institute of Arts. He is also a member of the Board of Directors of IFAR.

[1] Giorgio Vasari, *The Lives of the Most Excellent Painters, Sculptors and Architects*, first published in 1550 and revised and expanded in 1568.

Arguably, the first catalogue raisonné was done by Claude Lorrain in his *Liber Veritatis (The Book of Truth)*,[2] which, after all, is not just a book of drawings, but a book of records that sought to systematize and simonize his own output against falsehoods. The first Rembrandt catalogue raisonné was by Gersaint (published posthumously in 1751), a forerunner to the current Rembrandt Research Project, which I will touch on later. But one of the great historians, viewers of art and systematizers was John Smith, a dealer and a model for Hostede de Groot. Beginning in 1829, Smith sought to include not only a listing of paintings but a chronology and commentary on Dutch, Flemish and French painting.[3]

Within the walls of the Frick Art Reference Library, there exist nearly three thousand catalogues raisonnés. In its vast, million-item photothèque, which is a detailed resource, there is a photo of an authentic watercolor that failed to be reproduced or published in the definitive catalogue of an artist whose name, for legal reasons and other niceties, I won't mention. Auction catalogues are another resource in the Library. They are one of the most important primary materials for a catalogue raisonné.

Errors always occur within catalogues raisonnés, perhaps because of ignorance, perhaps intentionally, and, we suspect in some cases, deviously. Today's catalogues raisonnés are true multiple identifiers not only through the inclusion of photographs, but because of details on provenance, measurements, market history, exhibition history, and technique. And with x-rays, infrared, pigment analysis, paper analysis, and dendrochronology, we have an enormous group of tools to nail down the issue of authenticity. But we must never forget that excessive detail can produce a book that becomes a forger's handbook.

Catalogues raisonnés exist not only for paintings and drawings. There is a catalogue raisonné for Mercedes Benz and Porsche and Maserati, but those are beyond our scope. An opinion "of counsel" is something that a lawyer must stand behind and defend, and, similarly, a catalogue raisonné must perforce be the opinion "of counsel" in our field.

The Rembrandt Research Project is perhaps the most famous of recent committees or organized groups who seek to regularize an artist's work, but now that they have completed their deconstruction of Rembrandt's *oeuvre*, they are putting some objects back where they started.

The *Canyon Suite's* exclusion from the Georgia O'Keeffe catalogue raisonné in 1999, of course, renders those works all nearly worthless.[4] This is a key point, and care must be taken. In recent history there is *Zervos*, for Picasso, the most extraordinary catalogue raisonné.[5] Picasso and Klee were most helpful to their authors, by not only dating their works but in Klee's case, serially numbering them. There is a large catalogue raisonné, recently published, on Jacob Lawrence.[6] Peter Nesbett and Michelle DuBois, with the input of the artist [since deceased], had a great leg up on creating an early and accurate dating for the artist's works. Further, there is a rewriting of the catalogue raisonné of Mary Cassatt. Jay Cantor, working with a committee, seeks to order nearly one thousand works of Mary Cassatt, almost every one of them undated. This project is under the auspices of a dealer, which raises questions in some people's minds. And one could not omit John Rewald's Cézanne catalogue raisonné, which was thirty years in the making.[7] Rewald actually began this work in 1937 by critiquing Lionello Venturi's 1936 catalogue. However, Rewald's work began seriously in 1964, and was only recently completed, posthumously. Interestingly 110 works by Cézanne are included in Rewald's catalogue raisonné that were not in Venturi's. So there will always be new discoveries. Just this week I learned of the discovery of a presumably lost van Gogh drawing that will soon be exhibited. This is an enormously complex field, aided, in the end, by a combination of sleuthing, and, let us not forget, scholarship.

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[2] *Liber veritatis: Or a Collection of Prints after the Original Designs of Claude Le Lorrain*; . . . Executed by Richard Earlom, 2 vols. (London: J. Boydell, 1777), begun by Claude in 1635-36.

[3] John Smith (1781-1855), *A Catalogue Raisonné of the Works of the Most Eminent Dutch, Flemish and French Painters, in which is Included a Short Biographical Notice of the Artists, with a Copious Description of their Principal Pictures; a Statement of the Prices at which such Pictures have been Sold at Public Sales on the Continent and in England; a Reference to the Galleries and Private Collections in which a Large Portion are at Present* [...], 9 vols., with Supplement, London, 1829-42.

[4] On the problematic authenticity of *Canyon Suite*, a series of twenty-eight watercolors purported to date from O'Keeffe's stay in Canyon, Texas (1916-18), see the *IFAR Journal*, Vol. 3, no. 1 (Winter 1999/2000), pp. 8-9.

[5] Christian Zervos, *Pablo Picasso: catalogue de l'oeuvre*. 33 vols., Paris, 1932-78.

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[6] Peter T. Nesbett and Michelle DuBois, *Jacob Lawrence: Paintings, Drawings, and Murals (1935-1999), A Catalogue Raisonné* (Seattle: University of Washington Press, 2000).

[7] John Rewald, *The Paintings of Paul Cézanne: A Catalogue Raisonné.* Written in collaboration with Walter Feilchenfeldt and Jayne Warman. 2 vols. (New York: Harry N. Abrams, 1996).

• • •

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PROCEDURES AND PROCESS

NANCY MOWLL MATHEWS, MODERATOR
NEIL PRINTZ
SARAH FAUNCE
VIVIAN ENDICOTT BARNETT
JOYCE HILL STONER

INTRODUCTION

NANCY MOWLL MATHEWS*

If this were a meeting of philosophers, the following panel would be devoted to sorting out the many definitions of the word "authenticity." In philosophical parlance, the word refers to the essence of being, and that has been defined differently over the centuries. Most familiar to today's art historians is the use of the term in Walter Benjamin's 1930s essay "The Work of Art in the Age of Mechanical Reproduction," in which he addresses the assault on the art object's aura by modern means of replication.

> "A work is authentic, or genuine, if it is believed to be by the artist whose name has been attached to it."

But for this conference, we can dispense with the debate over the term authenticity because its meaning in this context is very clear and very narrow. That is – a work is authentic, or genuine, if it is believed to be by the artist whose name has been attached to it. The process of authentication is not even as broad as the determination of *who else* might have done it if not the artist in question, merely whether or not it was done by a very specific artist. Nor does authenticity address issues of value – whether it is a good or bad work of art in a connoisseurship sense – or whether it should or should not have monetary worth if bought or sold.

---

* Nancy Mowll Mathews, Ph.D., is the Eugénie Prendergast Curator, Williams College Museum of Art; President, Catalogue Raisonné Scholars Association; and co-author of two catalogues raisonnés – *Mary Cassatt: The Color Prints* (New York: Harry N. Abrams, 1989) and *Maurice Brazil Prendergast, Charles Prendergast: A Catalogue Raisonné* (Munich: Prestel-Verlag, 1990; Williamstown, MA: Williams College Museum of Art, 1995).

The term authenticity is even more circumscribed in this context by the understanding that the decision about genuineness is being made by a person or group of people who claim to arrive not at "absolute truth" but at the best informed and reasoned "opinion" that can be formed at this moment in history. In our Prendergast catalogue raisonné, we included the following statement of purpose:

> We do not wish to convey, nor do we state, that this catalogue is a complete record of all works of art created by Maurice and Charles Prendergast. Every work in the catalogue can be reasonably defended by the authors as genuine.

Scholars try to arrive at a dependable body of work of an artist. They adopt the highest standards of documentation and completeness. They amass untold archives of evidence concerning the artist – each work, the typical materials used, variations in signatures and inscriptions. They train their eyes to identify familiar patterns – and the occasional documented anomalies.

Yet, they see that their search for documentary evidence is always incomplete, and they know that opinions can change as new information emerges. They know that the artists themselves sometimes thwart an historian's efforts at clarity by making false statements about dating and even authenticity; by altering works of art – their own and others. In the Prendergast project, our claim of being able to "reasonably defend" those works we considered "genuine" seemed appropriate to a circumstance wherein very human scholars grapple with very human artists.

Having outlined the general principles by which every scholar dealing with authenticity must operate, I turn to the panelists who will demonstrate how these general principles are modified to fit specific artists. Each project faces the challenges presented by his or her subject, and each must develop unique procedures and processes. The infinite variety of working methods adopted by catalogue raisonné projects is nowhere more evident than when each tries to use a standardized electronic database. Standardization is quickly lost to customization. And there is no greater tribute to human creativity than the certainty that neither artists nor scholars can be shoehorned into a single rigid mold.

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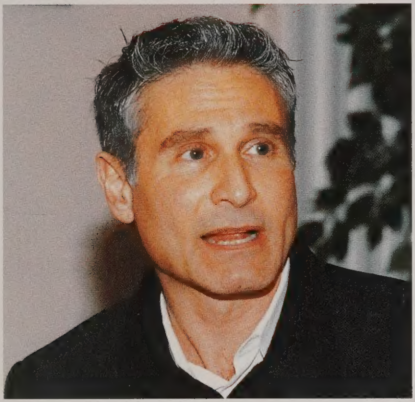
METHODS OF RESEARCH: CASE STUDIES FROM THE WARHOL CATALOGUE RAISONNÉ

NEIL PRINTZ*



This is how *POPism*, Warhol's memoir of the 1960s, begins: "If I'd gone ahead and died ten years ago, I'd probably be a cult figure today."[1] Hearing that sentence today, one can't help but feel a certain mordant pang for the Andy Warhol who wrote it in 1980, who grasped that his own history was already history, that the corpus of his work lacked only a corpse. Indeed in 1970, when Rainer Crone first assembled a partial catalogue raisonné of his work,[2] it might have seemed as if Warhol had really died in 1968, when he was shot by Valerie Solanas. Eight years later, a second catalogue raisonné would be launched by a young Swiss dealer, Thomas Ammann. In 1976, not only was Warhol still very much alive, you might say that he was in mid-career. Figure 1, *Skull*, will remind you of what Warhol was up to in 1976 – how intently he was painting after the 1960s and how compelling his painting continued to be.

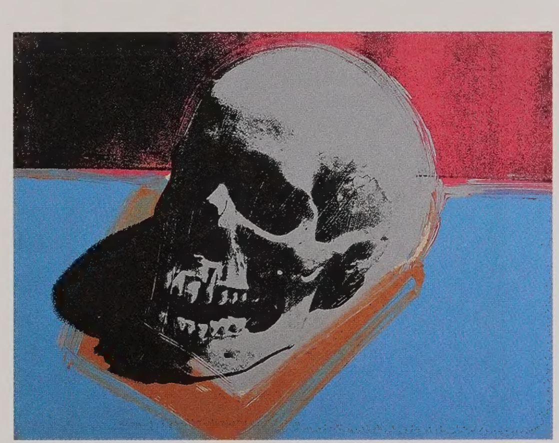


FIGURE 1. Andy Warhol. *Skull*, c.1976-77. Synthetic polymer paint and silkscreen ink on canvas, 15" x 19". Private Collection. © The Andy Warhol Foundation for the Visual Arts /ARS, NY. Photo: The Andy Warhol Foundation, Inc. / Art Resource, NY.

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* Neil Printz, Ph.D., is Co-editor of *The Andy Warhol Catalogue Raisonné: Paintings, Sculptures and Drawings*, Vols. 1 & 2 (New York and London: Phaidon, 2002). He is now preparing Vol. 3: Paintings and Sculptures 1970-1974.

[1] Andy Warhol and Pat Hackett, *POPism: The Warhol '60s* (New York: Harcourt Brace Jovanovich, 1980; Harper & Row, 1983), p. 3.

[2] Rainer Crone's catalogue raisonné was included in his book *Andy Warhol*, published simultaneously by Hatje, Hamburg and Praeger, New York. The books were produced in the context of Crone's research for his dissertation about Warhol, published as *Das bildnerische Werk Andy Warhols* (Berlin: Kommissionsvertrieb Wasmuth, 1976). The catalogue raisonné was somewhat revised and updated at that time.

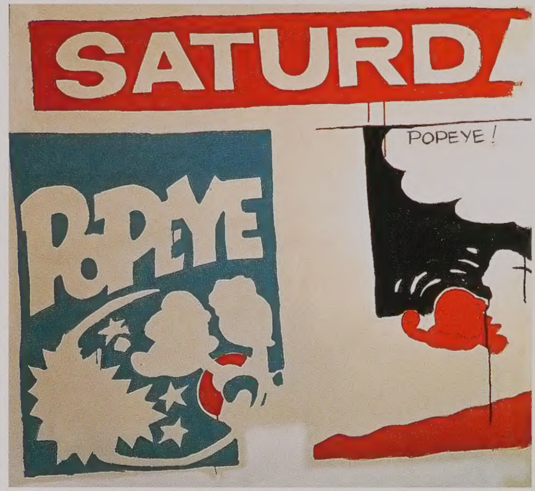

FIGURE 2. Andy Warhol. *Saturday's Popeye*, 1961. Synthetic polymer paint on canvas, 43" x 39". Ludwig Forum für Internationale Kunst. Collection Ludwig. © The Andy Warhol Foundation for the Visual Arts / ARS, NY. Photo: The Andy Warhol Foundation, Inc. / Art Resource, NY.

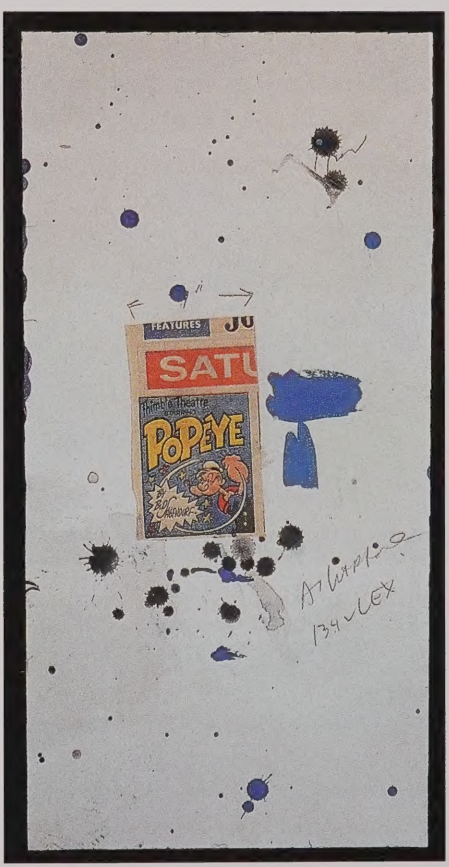

FIGURE 3. Andy Warhol, "Popeye" collage, 1961. The Andy Warhol Museum, Pittsburgh; Founding Collection, Contribution the Andy Warhol Foundation for the Visual Arts, Inc.

As you know, Warhol died a little more than a decade later, unexpectedly on February 22, 1987. In 1993, when the Andy Warhol Foundation for the Visual Arts hired me, the catalogue raisonné of paintings, sculptures and drawings – soon to be co-sponsored by the Warhol Foundation and Thomas Ammann Fine Art – was already seventeen years old. What still needed to be done? My co-editor at Ammann, Georg Frei, had established a database with several thousand entries, including ownership histories, exhibitions, and citations from the secondary literature. But thus far, no systematic review of original materials had begun. I identified three methods of primary research: first, the examination of works of art; second, archival review, especially Warhol's own papers; and third, what we might call an oral history – interviews and discussions with the people who had worked with Warhol and had known him. Three case studies, selected from my research, follow. Each focuses on a particular method, but in the interests of narrative, I shall change their order somewhat.

CASE STUDY 1
Archival Review

When Warhol died, among the things he left behind were the contents of approximately 1,500 cardboard boxes filled with ephemera: letters, photographs, odds and ends, souvenirs and the sources for his paintings – material that has become constituted as a formal archive at the Andy Warhol Museum in Pittsburgh.

POPism begins in 1960, a year that, like a magic number, has long been affixed to his first paintings of Pop subjects, including the comic strip paintings. The source of two, *Saturday's Popeye* (Fig. 2) and *Popeye* (Fig. 3), derives from the first panel of the comic strip (Fig. 6). However, nothing distinguishes this panel that Warhol used from any other first *Popeye* panel, except the image on its reverse, now glued to a sheet of paper. There was nothing to do but hold the glued panel up to the light. While I did so, my research associate, Sally King-Nero, drew the reverse side (Fig. 4). Fortunately, she was trained as an artist, and we could match her drawing to the sec-

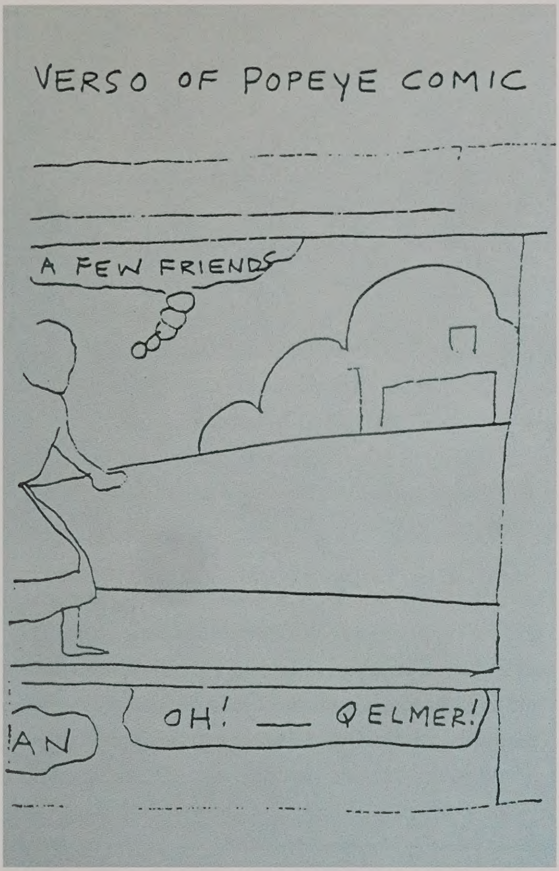
VERSO OF POPEYE COMIC
A FEW FRIENDS
AN
OH! — ELMER!

FIGURE 4. “Grandma,” drawn by Sally King-Nero, c.1995. Photograph courtesy of the Andy Warhol Foundation for the Visual Arts, Inc.

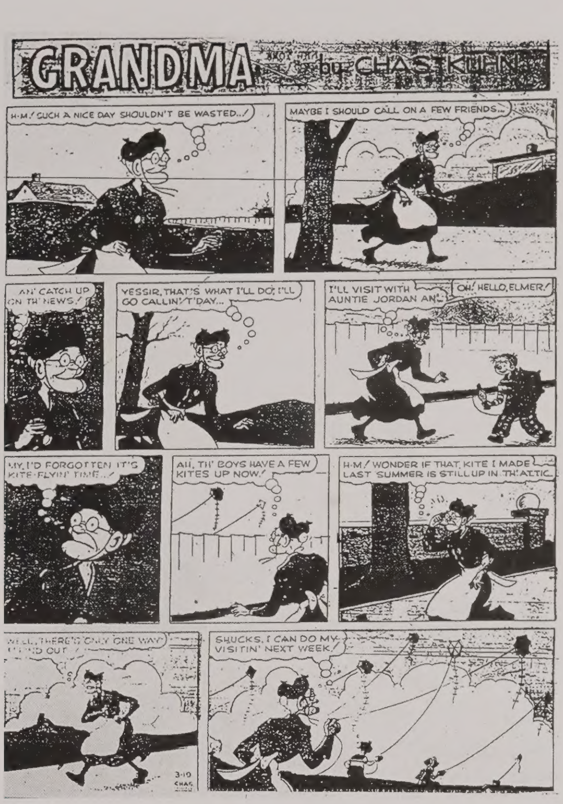
GRANDMA
by CHAS KUHN
H-M! SUCH A NICE DAY SHOULDN'T BE WASTED...!
MAYBE I SHOULD CALL ON A FEW FRIENDS...
AN' CATCH UP ON TH' NEWS!
YESSIR, THAT'S WHAT I'LL DO! I'LL GO CALLIN' T'DAY...
I'LL VISIT WITH AUNTIE JORDAN AN'-
OH! HELLO, ELMER!
MY, I'D FORGOTTEN IT'S KITE-FLYIN' TIME...!
AH, TH' BOYS HAVE A FEW KITES UP NOW!
H-M! WONDER IF THAT KITE I MADE LAST SUMMER IS STILL UP IN TH' ATTIC
WELL, THERE'S ONLY ONE WAY T' FIND OUT!
SHUCKS, I CAN DO MY VISITIN' NEXT WEEK!
3-19
CHAS

FIGURE 5. “Grandma,” *New York Journal-American*, Saturday, March 18, 1961. Grandma © 1961, King Features Syndicate, Inc. World Rights Reserved. Reprinted with permission of King Features Syndicate.

ond panel of the comic strip “Grandma” (Fig. 5), from the Saturday *New York Journal American* on March 18, 1961. On the reverse, upper left, was the *Popeye* panel that Warhol used (Fig. 6). Not only could we now identify the curious red shape at the right in *Saturday's Popeye* as baby Swee'pea's bottom, we had a *terminus a quo* – a date *before which* neither painting could have been made, and the date was 1961.

In fact, were we to query each of the five paintings that Warhol included in the public debut of his Pop paintings in the window of Bonwit Teller – *Advertisement, Little King, Superman, Before and After* [1], and *Saturday's Popeye*, as you see them in Figure 7 – and of course, we did – we found that their sources could be dated to late March or early April 1961 in each instance. The display in Bonwit's window was on view for only one week in April – which week, however, we didn't know, only that the windows were changed on Tuesday – thus, either on April 4, 11, 18 or 25 in 1961. Since the date of the source of *Little King* is April 3, either April 11th or April 18th became the most credible *terminus ad quem*, the date *after which* these works could not have been made. We could now definitively situate these works within a rather narrow interval of time – between late March and early April 1961. A systematic archival review of Warhol's sources showed no evidence of works that might be dated to 1960. For example, the following five works – *Vacuum, Officers Shoes, Storm Window* [1] and [2], and *Icebox* – all derive from ads in the same issue of the *New York Daily News*, Sunday, March 26, 1961.

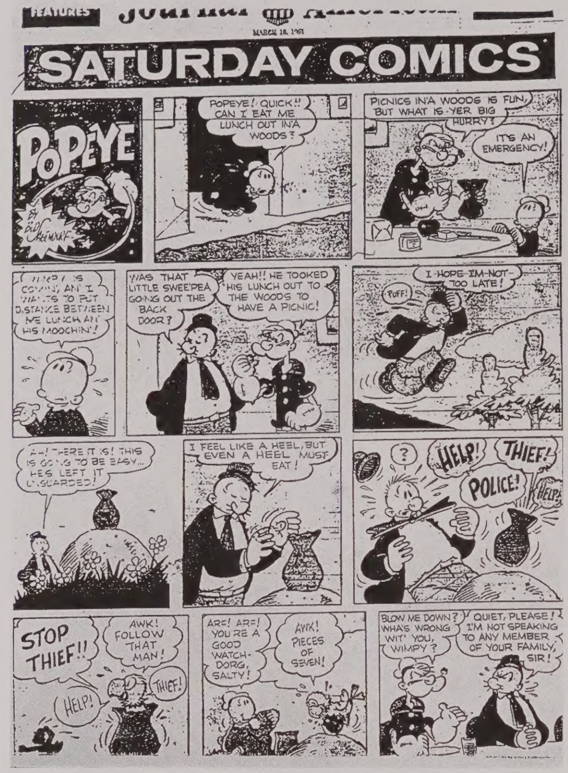
FEATURES
Journal American
MARCH 18, 1961
SATURDAY COMICS
POPEYE
BY BUD SAGENDORF
POPEYE! QUICK!! CAN I EAT ME LUNCH OUT IN'A WOODS?
PICNICS IN'A WOODS IS FUN, BUT WHAT IS YER BIG HURRY?
IT'S AN EMERGENCY!
WIMPY IS COMIN', AN' I WANTS TO PUT DISTANCE BETWEEN ME LUNCH AN' HIS MOOCHIN'!
WAS THAT LITTLE SWEE'PEA GOING OUT THE BACK DOOR?
YEAH!! HE TOOKED HIS LUNCH OUT TO THE WOODS TO HAVE A PICNIC!
I-HOPE-I'M-NOT-TOO LATE!
PUFF!
AH! THERE IT IS! THIS IS GOING TO BE EASY... HE'S LEFT IT UNGUARDED!
I FEEL LIKE A HEEL, BUT EVEN A HEEL MUST EAT!
?
HELP!
THIEF!
POLICE!
HELP!
STOP THIEF!!
AWK! FOLLOW THAT MAN!
THIEF!
HELP!
ARF! ARF! YOU'RE A GOOD WATCH-DORG, SALTY!
AWK! PIECES OF SEVEN!
BLOW ME DOWN? WHA'S WRONG WIT' YOU, WIMPY?
QUIET, PLEASE! I'M NOT SPEAKING TO ANY MEMBER OF YOUR FAMILY, SIR!

FIGURE 6. "Popeye," *New York Journal- American*, Saturday March 18, 1961 Popeye © 1961, King Features Syndicate, Inc. World Rights Reserved. Reprinted with permission of King Features Syndicate.

CASE STUDY 2
Oral History

However specific printed dates may be, oral histories, not unsurprisingly, are often unreliable. Memory is selective. This is to be expected. But what continued to surprise me was the degree to which recollections settled into established stories, how fixed and formalized they had become. This is especially true in the case of Warhol.[3] I was traveling well-trod turf, and everyone already seemed to have his story down pat. What follows, however, is one of my rare breakthroughs into new territory through the personal medium of one of Warhol's contemporaries.

His name was Alan Groh. Before he died in 1996, I was fortunate enough to have visited him. Groh had been the director of Eleanor Ward's Stable Gallery, and I was attempting to reconstruct Warhol's first solo show during November 1962 – a decisive

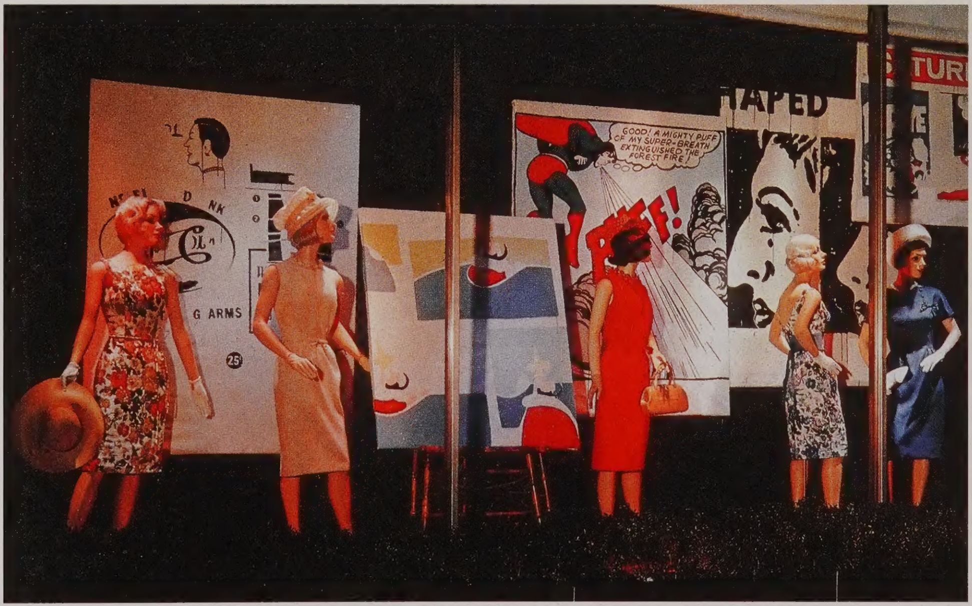
GOOD! A MIGHTY PUFF OF MY SUPER-BREATH EXTINGUISHED THE FOREST FIRE!
PUFF!
G ARMS
25¢
APED
TURN

FIGURE 7. Five Andy Warhol paintings in a display at Bonwit Teller, New York, April 1961. Photo: The Andy Warhol Foundation, Inc. / Art Resource, NY.

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[3] The first oral histories with his colleagues, assistants and friends appeared in 1971, in John Wilcock's *Autobiography and Sex Life of Andy Warhol*. They reach an apogee of sorts in the work of Patrick S. Smith, whose interviews were conducted in the late 1970s, although they were not published until the 1980s.

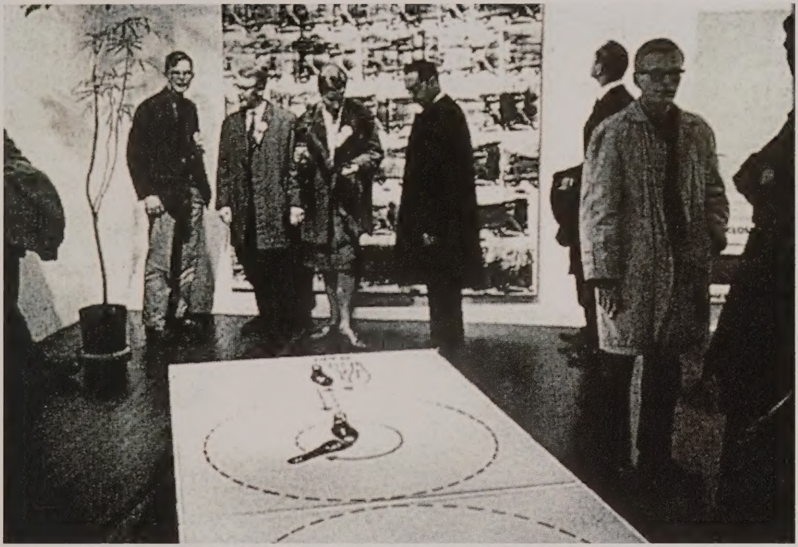

FIGURE 8. Opening, Andy Warhol exhibition, Stable Gallery, NY, November 1962. Photograph by Alfred Statler.

moment in Warhol's career. I arrived with a rough notion of the works that I thought might have been shown. Alan Groh claimed that he barely remembered – it had been so long ago, almost thirty-five years, in fact. But when I showed him my floor plan with its tentative reconstruction, he shook his head impatiently, sat down and re-drew the plan. His lines wavered, but not his memory, which was extraordinary and acute.

Not long after, I had an opportunity to corroborate Alan Groh's drawing. From the byline of a photograph reproduced in *Time* that showed Warhol's Stable opening, accompanied by the caption "It's a long way from Giorgione" (Fig. 8), I was directed to the widow of the photographer, Alfred Statler. In his contact sheets, behind an opening night crowd that included Jasper Johns, James Rosenquist, Richard Bellamy, and Henry Geldzahler, among others, I could glimpse enough of the paintings on the walls to confirm Alan Groh's total recall. Briefly, let me

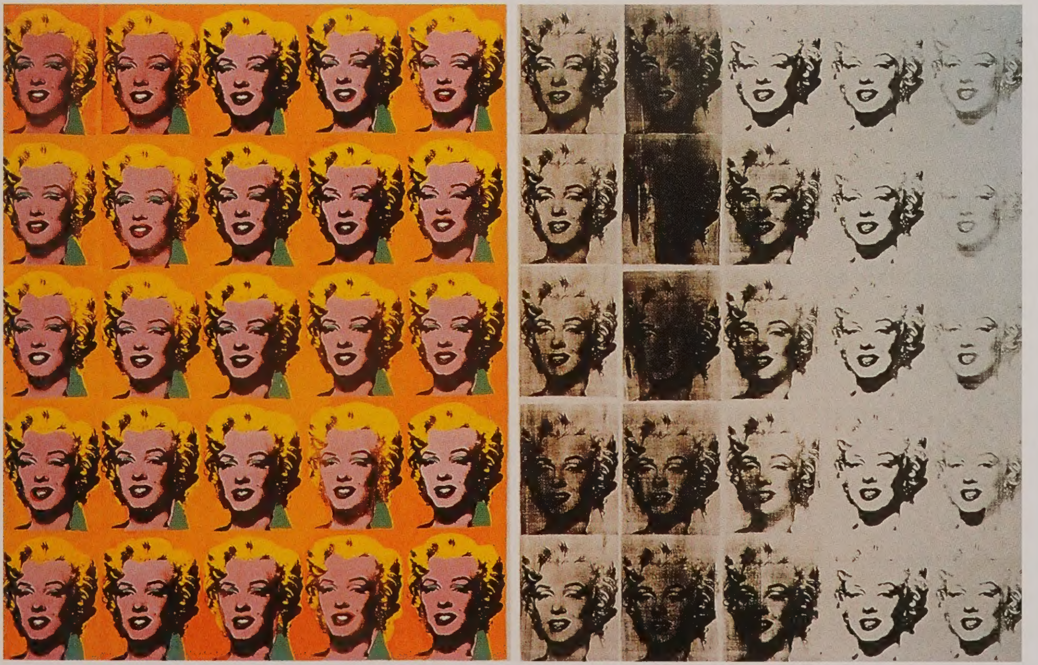

FIGURE 9. Andy Warhol, *Marilyn Diptych*, 1962. Synthetic polymer paint and silkscreen ink on canvas, 6'10" x 57". © The Andy Warhol Foundation for the Visual Arts / ARS, NY. Photo: The Andy Warhol Foundation for the Visual Arts, Inc. / Art Resource, NY. TM 2006 Marilyn Monroe LLC by CMG Worldwide, Inc. / www.MarilynMonroe.com

> "The *Silver Liz* . . . was abandoned and left incomplete: the local color only partially painted in. Unlike Marilyn, who was a blonde, Liz's hair is the color of the black screen."

revisit what he remembered, what Johns, Rosenquist, Bellamy, Geldzahler and many others saw at the Stable Gallery on the historic evening of November 6, 1962.

Warhol's *Gold Marilyn* was framed in the doorway, as you entered. It dominated a narrow corridor in which eight small heads of Marilyn on backgrounds of different colors were shown in grids of four, each on opposing walls. These were known as the "Marilyn Flavors." If you turned right to the large north gallery and proceeded counter-clockwise, the following works might be seen: *Marilyn Diptych* (Fig. 9), *Close Cover Before Striking (Coca-Cola)*, and *Baseball* – Warhol's first photo-silkscreen painting. Two *Dance Diagram* paintings were installed on the floor in front of *Baseball*, as shown in Statler's photo (Fig. 8). On the north wall, framed by the corridor, was *129 Die in Jet* – Warhol's first painting to explicitly address the theme of death – and on the west wall, *210 Coca Cola Bottles*. In the smaller south gallery facing East 74th Street, the *Troy Diptych* and *Red Elvis* were hung on facing walls, on either side of *Do It Yourself (Sailboats)*.

CASE STUDY 3
Examination of Works

Case Study 3 concerns itself with what I consider to be our most critical practice: not authentication *per se*, but the examination of works of art. There is a tendency to collapse the two, reversing method and function. That is to say, we do not examine works of art by assessing authorship, but instead, assess authorship by looking at the work.

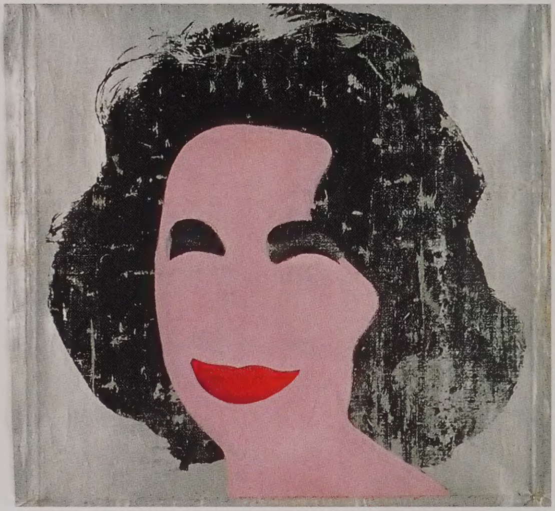

FIGURE 10. Andy Warhol, unfinished *Silver Liz*, 1963. Photograph courtesy of the Andy Warhol Foundation for the Visual Arts, Inc.

The difference between color and line and tone, the distinction between painting and drawing – the latter negotiated through silkscreen printing – is made distinct in two early diptychs, *Marilyn* (Fig. 9) and *Troy*, from the Stable show. From the very first, there was no question; you could see it plainly. Michael Fried had pronounced upon it in his review of Warhol's Stable show.[4] The black screen sat on top of the painted color, a layer of drawing superimposed over a layer of painting, inverting the conventional decorum of drawing as underdrawing, under the paint.

This much may have been evident, but an important question remained. Apart from the background which was overall, how did Warhol know where to place the other colors, I wondered, how did he locate the local colors? Was there an underdrawing after all? It sent us to the crevices of the painting, to the interstitial zones where two local colors did not quite meet. We also pored over surfaces where the color was most dilute. We began to see traces under the local color: not an underdrawing *per se*, but a preliminary impression of the black screen that served as the underdrawing.

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[4] Michael Fried, "New York Letter," *Art International* (Dec. 20, 1962), p. 57.

"Doing a catalogue raisonné after all is a lot like detective work. Its methods are based on the evidentiary procedures of art history."

The *Silver Liz* (Fig. 10) was found at the Warhol Foundation. It looks like a Liz that has been defaced, but it's not. It is simply the next phase of the process, abandoned and left incomplete: the local color only partially painted in. Unlike Marilyn, who was a blonde, Liz's hair is the color of the black screen. The waves of her hairdo hold no shadows in their recesses; instead, it is pure silhouette. But if you look under and around the pink layer of the face, you can see the markings of the preliminary screen.

The abandoned *Silver Liz* reaffirmed a hypothesis that, happily, I was able to have confirmed in the laboratory at the Tate Gallery in London. Among the works by Warhol in its collection is the *Marilyn Diptych* (Fig. 9). I met with a Tate conservator, Tom Learner, and curator Jo Crook. They were working on a book, now published, about artist's materials and techniques during the 1960s. I posed my question about local color and pitched my theory about a preliminary screen. Using magnification and cross-section, Learner confirmed that a black alkyd medium – a medium compatible with commercial silkscreen inks – could be found both on top of and under the layer of paint.

It is always validating to have one's theories supported in the lab, but I am advocating method, not science *per se.* Nor is it a matter of objective versus subjective. Both seem to me to be too categorical to describe what it is that I think I do.

In this light, I would like to conclude as I began, with Warhol in his own words. Five years after *POPism*, Warhol published a book called *America* in 1985. This is how it begins: "Everybody has their own America, and then they have the pieces of a fantasy America that they think is out there but they can't see."[5] Let me propose that we paraphrase Warhol's words slightly, substituting his name for America – an exchange that seems to be not only apt, but one that you may be sure would have pleased Warhol himself. Indeed, everybody has their own Andy Warhol, such is his celebrity and the public fascination with his persona. Like everybody else, I have only the pieces. I would like to think that once these pieces have been assembled, the Andy Warhol Catalogue Raisonné will be able to reconstruct the body of Warhol's work intact, rather like an antique vase. We may think that the work we do is strictly archaeological, a tissue of pure fact without pieces of fantasy, but I think Warhol is really right. It's about both. Like a reconstructed vase, a body of work may be made up of both the pieces that you can see and the pieces that you think are out there but you can't see – the pieces that are lost, out of reach, or still unknown. Doing a catalogue raisonné after all is a lot like detective work. Its methods are based on the evidentiary procedures of art history – clues from the archives; the verbal testimony of those who were there; and above all the material record of the work itself. But we would be lost if we couldn't make educated guesses or follow our hunches from time to time.

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[5] Andy Warhol, *America* (New York: Harper & Row, 1985), p. 8.

ESTABLISHING RELIABLE EVIDENCE

SARAH FAUNCE*

For many people, a catalogue raisonné is essentially a market resource. The market needs a final statement on authenticity in order to maximize profit. Earlier catalogues raisonnés often reflected this fact. The aim was to achieve a book of illustrations accompanied by as many references as possible, to be used primarily by the market as a kind of dictionary of correct definitions. The potential that such a publication might have of contributing to the knowledge of the artist's work, the shape of his career and its evolving concerns and inventions – the kind of thing that requires a perspective of the whole *oeuvre*, and which can actually help in the attribution process – was ignored. (You will understand that my own perspective on this matter comes out of the experience of working in the context of this type of earlier catalogue.)

> "It is this concept of argument from evidence that I think is basic to the procedures of composing a catalogue raisonné."

This is not said to disparage the market, which does legitimately need reliable evidence of authenticity. Authenticity is not a fiction; we are not, I believe, entitled to freely speculate or invent scenarios by which any canvas may be considered the fruit of a particular master's mind and hand. There is a lot of talk about this sort of unearned invention, but it's just popular chatter, an amusing self-indulgence. When in serious mode, most people still believe in a category called "reliable evidence." It is this concept of argument from evidence that I think is basic to the procedures of composing a catalogue raisonné. It is a concept that covers a whole array of specific methods, and embraces both of the frequently opposed categories of "connoisseurship" and "science."

This evidence comes to us in at least four broad headings:

HISTORICAL EVIDENCE

Historical, that is to say, documentary. This includes the documents of ownership – of buying, selling and bequeathing, and of exhibition and reproduction: all the materials of a provenance. The histories of fully established and richly documented works are like the two densely packed pages in the program of the London production of "The Royal

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*Sarah Faunce is Director of the Courbet Catalogue Raisonné Project and Curator Emerita of the Brooklyn Museum.

Family" (Barrymores, not Windsors), in which we can peruse the career history of a great actress, Judi Dench, who we already knew was authentic and masterful. But with less historied works of art, or more questionable ones, such documents can play evidential roles – if they are secure in themselves. Just matching the known generic title, medium and dimensions of a painting to those from a likely sale catalogue does not make that catalogue a solid piece of evidence all by itself.

Along with provenance, other important documents include the artist's letters and records, the letters and memoirs of contemporaries, critical writings of the period – the humble dealers and exhibitors' labels on the back of the stretcher or frame. These can be as important as anything in libraries. Here is a call to all owners, dealers, and framers: do not obliterate labels!!! I recently examined a painting that had two informative labels, despite one being partially cut off – but there were three areas on the stretcher where potentially useful labels had been scratched off or swabbed over with brown paint.

PHYSICAL EVIDENCE

Physical in the sense of the information derived by professional conservators from observations of the makeup of the canvas and the paint layers; the history of the canvas, its linings and repaints; and what can be seen beneath the surface through radiograph and other technologies. These kinds of evidence can be highly significant for the knowledge of the artist's working procedure, and, by extension, for arguments in favor of authenticity. Speaking as someone who is working on Courbet, about whom much can be discovered through these kinds of examination, I can only say that in an ideal world a large proportion of his paintings would routinely be examined in this way.

VISUAL EVIDENCE

Visual in the sense of esthetic observation – the realm of Connoisseurship, so often derided in recent years as wholly subjective and arbitrary, and so often defended for the wrong reasons, as though it involved some kind of magic. We know, for instance, that when a man like the late David Carritt nosed out masterpieces in country cottages and remodelled embassies and estate sales, his "eye" searching over all the qualities `of the surfaces of these paintings was, in fact, a pair of eyes that had been making these searches and observations since his teen years. Furthermore, his "mind's eye" was a rich database of visual and historical knowledge that constantly connected with one another. Thus, at the Mentmore sale in the late 1970s, he could detect, as others could not, under the brown surface of a work catalogued as by Van Loo, the presence of a beautiful early work on a relatively obscure subject, long thought to be lost, by Fragonard, *Psyche and her Sisters*, now in the National Gallery in London.

"Here is a call to all owners, dealers, and framers: do not obliterate labels!!!"

David, in the view of a number of people including me, was a genius – but we are not talking about geniuses, rather about procedures for establishing different kinds of evidence. Someone who has an eye trained in the observation of paintings and who has spent considerable time studying and comparing the works of a particular artist is bound to develop in his or her mind a set of categories that apply to that artist's range of ways of conceiving form, handling the medium and building a painting. While the vocabulary of style may not be a scientific one, these sets of categories are capable of being formulated in words and demonstrated to others. In the case of paintings that emerge onto the market from a lifetime in one family, with no documentary history – this kind of evidence is especially important, together with technical examination. This is equally true of those works that appear to have doubtful and/or incorrect attributions. In these cases, careful arguments have to be made, arguments that require a convincing counter-argument from those with an opposing view. These debates are legitimate, and necessary; I do not think that it is acceptable to reply to one view or another with the phrase, "It's just a matter of taste."

It should go without saying that this last category of evidence is impossible to build up except on the basis of studying the works themselves and using photographs only as an aide memoire. Of course in the publication itself, no matter how well reproduced the pictures are, there will be elements and qualities that cannot be seen in reproduction; but the argument should be there, for the use of those who have the actual painting in front of them. This brings up another matter of procedure: there will always be works that cannot be seen and that are available only in photographs. These, I think, must be clearly defined as such, with the acknowledgement of the specific limitations involved in making observations only from photographs.

NEW SCHOLARSHIP

A fourth important area of evidence for authors of catalogues raisonnés is the current scholarship in the field, both concerning the artist and the milieu in which he worked. A prime example in recent years for Courbet studies is Petra Chu's publication of the artist's letters.[1] These not only provide useful documentation for a certain number of paintings, but serve to open up new areas of understanding of the artist's production. Professor Chu herself as well as other scholars, such as Patricia Mainardi, have also done work in the relatively new field of "Market Studies," that is, investigating the relationship of the painter to his audience and his buyers. The letters tell us a lot about his ways of creating public awareness, of marketing his work, and his practice of making variants of the compositions that pleased him and attracted buyers. Thus, it is becoming clear that Courbet, while forcefully rejecting the philosophy and teaching traditions of the Académie des Beaux Arts of his day, remained rooted in the earlier artisanal tradition of the painter as inventor of compositions, which he could then make in several versions at the request of clients who valued them equally. He combined this older practice with a very new and modern practice of "public relations," which he recognized as necessary in view of the changing character of patronage in his lifetime. It is fairly obvious how this clarification can be of great assistance in the analysis of a specific group of Courbet's paintings.

> **"'Reliable evidence,' however, does not necessarily lead to absolute certainty in the 'FDA approval' sense. . . . And there's the rub, because, of course, in the real world the market demands certainty . . ."**

Thus, to sum up: our aim should be to draw conclusions based on reliable evidence, and to use this information to provide a clearer picture of the artist's individual works and his *oeuvre* as a whole. "Reliable evidence," however, does not necessarily lead to absolute certainty in the "FDA approval" sense. While we can all agree philosophically that there is no such thing as absolute certainty in the world, just as there is no absolute objectivity possible in our various points of view, there are degrees. The crucial question is, as in so many cases: What are the alternatives? For example, what argument might be made in favor of the statement that the *Burial at Ornans* was not painted by Courbet? But on the other hand, there are cases – many of them involving the current physical condition of the work – in which there is simply not enough evidence to draw anything more than a provisional conclusion, pending the possible emergence of future evidence.

And there's the rub, because, of course, in the real world the market demands certainty, because the potential buyers demand it. This situation goes toward the extreme in our era, when prices are very high, and the celebrity of a name seems to mean far more than the quality of a painting. But perhaps one can hope that as catalogues raisonnés become more dense and filled with relevant information that provides bases for arguments, it may become more acceptable for dealers to present the reliable facts in the case, and for collectors to have more trust in their own taste and judgment.

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[1] Petra ten-Doesschate Chu, edit. and trans. *Letters of Gustave Courbet* (Chicago: University of Chicago Press, 1992).

THE KANDINSKY CATALOGUE RAISONNÉ

VIVIAN ENDICOTT BARNETT*

In 1982, when I was asked to continue work on the Kandinsky catalogue raisonné undertaken by the late Hans Roethel, I worried how I would ever find all the watercolors. Initially, I was hesitant to take on such an enormous research project. I did so only after funding was secured and the Hans K. Roethel-Jean K. Benjamin Archive was established at the Guggenheim Museum to house and pay for my work on the catalogue raisonné. At that time I was curator of the Guggenheim, and the museum's director, Thomas Messer, played an instrumental role in finding a way for me to work on the catalogue. The two volumes on Kandinsky's watercolors, gouaches and tempera paintings were published in 1992 and 1994, after I became a free-lance curator, working for several museums. I still maintain an affiliation with the Roethel-Benjamin Archive at the Guggenheim, but I am currently compiling the catalogue raisonné of Kandinsky's drawings for the Städtische Galerie im Lenbachhaus in Munich. I wonder how I will find all the drawings (knowing that I won't) – but I am much more concerned about all the paintings, watercolors and drawings *attributed* to Kandinsky that find their way to me – and keep coming back. From the beginning I was aware of numerous problematic works, but I had no idea how many there would be and how much time, effort and harassment they would entail. Suffice it to say that the art "market" has changed tremendously over the past twenty years and endangers the ivory tower.

> **"From the beginning I was aware of numerous problematic works, but I had no idea how many there would be and how much time, effort and harassment they would entail."**

Virtually all the policies that I initiated are still in place – but the procedures have become more complex. When I began to work on the catalogue raisonné, the Société Kandinsky had already been founded by the artist's widow, Nina Kandinsky, with its headquarters in Paris at the Centre Georges Pompidou. A legal entity in France, the Société's purpose is to promote and to safeguard the work and the memory of Kandinsky by promoting exhibitions, research, and publications and by protecting his work from potential abuse. In 1983 the Société Kandinsky established a Catalogue Raisonné Committee comprised of museum curators and directors within its own membership and formulated a letter regarding the inclusion or non-inclusion of works in the catalogue raisonné. The Société does not and never has given certificates – nor do I. The Société provides a simple letter, free of charge, to the owner stating in French that the Catalogue Committee, in agreement with the author, has decided to include or not include in the catalogue or in the addendum to the catalogue, a specific work.

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* Vivian Endicott Barnett is Consulting Director, Roethel-Benjamin Archive, Guggenheim Museum, and author, *Kandinsky Watercolours: Catalogue Raisonné, 1900-1921 and 1922-1944*, 2 vols. (Ithaca, NY: Cornell University Press, 1992-94). She is also compiling the catalogue raisonné of Kandinsky's drawings.

"I want to underline the importance of seeing the originals and not working from photographs."

From the beginning I have attempted to see all works – whether those to be included in the catalogue raisonné, or those to be studied by the Committee. While it is impossible to locate everything, I have examined thousands of paintings, watercolors and drawings – and made detailed notes about them. I want to underline the importance of seeing the originals and not working from photographs. Moreover, in examining works, it may be necessary to see them out of the frame, under special kinds of light, and sometimes with a conservator. Whenever possible, I have taken the measurements myself – following consistent procedures for measuring works and also for cataloguing the medium. In a few cases works were omitted from the catalogue because it was not possible for members of the Catalogue Raisonné Committee, including myself, to study them, and it proved impossible to judge the works from photographs. In other cases, archival photographs are all that remain of lost or destroyed works of art. However, reliable documentation and provenance information are essential before accepting old photographs from just any source.

The first volume of the catalogue raisonné of oil paintings appeared in 1982, soon after Dr. Roethel died.[1] Owners and potential buyers of pictures that were not included contacted me and wanted to know why the works had been omitted. I examined all the paintings and, after consultation with the Catalogue Raisonné Committee, arranged for the Société (of which I was not a member at that time) to write letters to the owners regarding our decisions. Either I saw works while traveling frequently for the Guggenheim or owners brought the works to New York for me to see. In the late 1980s it became easier to travel in the Soviet Union. The first exhibition of Kandinsky's art in Soviet collections, which was organized by the State Tretiakov Gallery in Moscow in 1989, provided an opportunity for the Catalogue Raisonné Committee to examine works from twenty museums as well as Russian private collections. In 1990 the members of the Committee met in the Städtische Galerie im Lenbachhaus in Munich to examine canvases as well as works on paper and to compare them to similar works that had belonged to the artist and were preserved by Gabriele Münter.

PROCEDURES

Since 1990, the Committee has been meeting approximately once a year, sometimes more often, when there is a meeting of the full membership of the Société. We often examine works in Paris at the Centre Pompidou, where the works of art from the artist's estate as well as his papers were bequeathed by Nina Kandinsky. The archives of the artist – especially Kandinsky's own Haus Katalog or inventory – as well as the papers of his widow, his friends and art dealers, are the primary sources of information for the catalogue raisonné. But the physical presence of an object presented next to originals of undisputable authenticity is essential.

When the Catalogue Raisonné Committee began to examine objects, we realized the need for obtaining a legal release. The museum where the meeting takes place is not liable for any loss or damage to works while in its possession or in transit and does not provide insurance coverage. The works are sent to us at

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[1] Hans K. Roethel and Jean K. Benjamin, *Kandinsky: Catalogue Raisonné of the Oil Paintings*, 2 vols. (Ithaca, NY: Cornell University Press, 1982-84).

"We do not schedule meetings to meet other people's deadlines. . . .
We do not provide copies of our letters to future owners. . . .
We do not provide reasons for our decisions."

the owner's expense and the owner's risk. The form of release and indemnity, which must be signed by the owner, begins:

> This is to confirm that I own the work of art described below, that I have requested an opinion concerning such work from the Société Kandinsky Catalogue Raisonné Committee, that I have not requested such opinion in connection with any past or contemplated commercial transaction, and that I understand that in agreeing that such opinion may be given, you are relying on the foregoing statements. I further confirm that no fee has been requested for such opinion and that I have not paid any such fee." (I should add that contributions, plane tickets, hotels, and dinners are also not accepted.)

The owner must ask the Committee to study the work and must make it available to us. The owner must wait until the Société meets. Sometimes we need to study the work further, do research, have technical analysis done, and even examine it again before writing a letter. We do not schedule meetings to meet other people's deadlines. Owners and their representatives are not permitted to attend meetings. We make every effort not to become involved in the sale or purchase of works. We do not provide copies of our letters to future owners. As I explained earlier, the letter simply states a scholarly opinion of whether a work will be included or will not be included in the catalogue raisonné. We do not provide reasons for our decisions.

The Catalogue Raisonné Committee examines works that are not included in the four published volumes of the catalogue raisonné and, in addition, assists the author in studying difficult works before they are included (or not) in the catalogue. Thus, there is a distinction between the role of the Committee and that of the person who actually compiles the catalogue raisonné. Increasingly, I request that all the members of the Committee examine a problematic work rather than looking at it alone. The expanded role of the Committee reflects the reality of the marketplace and the prevalence of problem pictures (mis-attributions, fantasies, pastiches).

The possibilities for fraud seem to increase each year. The proliferation of copies is everywhere – whether copies of major paintings in museum collections, copies of drawings that have appeared in auction catalogues, or altered copies of my letters regarding non-inclusion of works in the catalogue raisonné. In recent years, the wonders of technology have brought about a renewed need for paper files and scraps of documentation. It is essential to keep a paper trail of handwritten notes of when, where and what you see (how it was mounted or what was on the stretcher), to check provenances meticulously, and to make photocopies of every letter you write. In the age of e-mail, I have gone back to more secure means of communication that cannot be altered – and I do not accept images sent by e-mail. Even more than in the past, I want to know who the owner is, where she lives, where the work is located. Even if your artist is not well known, you must be cautious and alert to problems.

In conclusion, I want to emphasize the advantages of a committee to protect the individual scholar, to serve as a forum for questions, and to provide additional sources of information and extra "eyes." I find the museum affiliation ideal for comparing works of art, examining them with conservators, receiving mail and messages, and providing security. The catalogue raisonné author definitely needs a buffer zone. Although a catalogue raisonné is a scholarly book based on years of research, it brings the author up against the shadier sides of the marketplace. You must establish procedures to protect yourself, to keep your distance and set your own terms – even if you don't see the need to do so now.

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PARTNERSHIPS BETWEEN CONSERVATORS AND ART HISTORIANS IN THE CREATION OF CATALOGUES RAISONNÉS

JOYCE HILL STONER*

This presentation will be a fifteen-minute "commercial" for involving conservators in art-historical research and writing – perhaps even from the outset – for projects such as catalogues raisonnés. Some of the audience members today, Barbara Buhler Lynes and Arthur Wheelock, for instance, would concur, I believe, that their publications have been enhanced by the participation of conservators, in both cases from the National Gallery in Washington. And the National Gallery is also the site of the CASVA "paired" fellowships grants, encouraging research projects involving partnerships of art historians working with conservators.

> "This presentation will be a fifteen-minute 'commercial' for involving conservators in art-historical research and writing . . ."

A conservator is happiest with an art historian on one arm and a scientist on the other. George Stout of the Fogg Art Museum in the 1930s called these three combined disciplines "the three-legged stool" of art conservation. Before we carry out a treatment, we would like to know as much as possible about the chemical make up of the painting and contemporary accounts of how it looked. For example, the British artist J. M. W. Turner may have built up areas of impasto with wax; therefore, a conservator should know ahead of time NOT to use a hot table for a treatment of such paintings. And John Ruskin had already commented on the fading of Turner's pigments. Age and odd previous treatments may have already significantly changed the look of certain paintings. The more we know about these changes, the more we are prepared to design a sympathetic treatment.

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Therefore we conservators need YOU to do our best work, but I regret to say that art historians and scientists usually go about their daily lives without thinking about needing conservators. Others of my colleagues may worry about the scientists, but after being a practicing (and teaching) painting conservator for twenty-five years, I finished a Ph.D. in art history and am hoping to increase collaboration between those two fields during the next twenty-five years of my career.

How can conservators help art historians with research and writing? Some excellent case studies exist. In the early 1980s at the Metropolitan Museum of Art, Maryan Ainsworth, art historian, worked with conservator John Brealey and scientist Pieter Meyers to examine paintings by Van Dyck, Vermeer, and Rembrandt through neutron activation autoradiography. Under a Van Dyck painting of St. Rosalie they found an early self-portrait by the artist. Autoradiographs of Rembrandt portraits showed that the artist was so concerned about the outline of the hats of his sitters, sometimes as many as five different hat profiles could be identified.[1]

In 1988 Gridley McKim-Smith worked with conservator Greta Andersen and scientist Richard Newman to examine Velasquez more closely.[2] Gridley has even proposed "social history through the cross section," how comparing cross sections (tiny pinpoint-sized flakes of paint under the microscope showing the stratigraphy of the painting, the different layers built up by the artist) could show how Velasquez changed the color of his grounds from red to white around 1628-29, after the successful out-of-town artist Peter Paul Rubens came to Madrid.

In Chicago in 2001, the College Art Association and Heritage Preservation (formerly known as the National Institute for Conservation) gave an award to art historian Andrea Kirsh and conservator Rustin Levenson for their collaborative book *Seeing Through Paintings* (Yale University Press, 2000). For this publication the two consulted conservation laboratories and records from around the world. This book is being gainfully used by teaching conservators to alert art history students to the advantages of visiting conservators in their studios or laboratories. The following examples, which are excellently illustrated in the Kirsh-Levenson book, provide insights into artists' thought processes and methods:

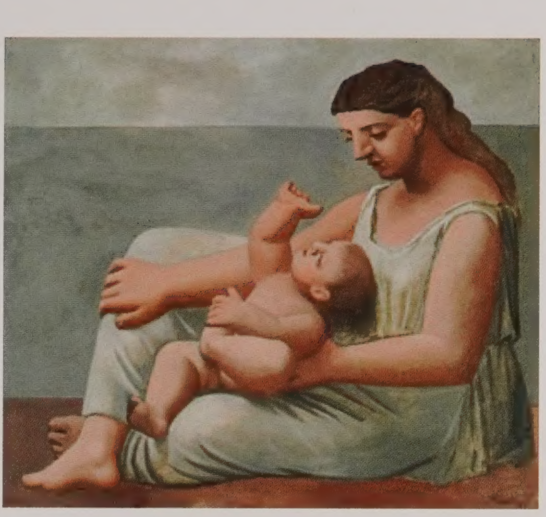

FIGURE 1. Pablo Picasso, *Mother and Child*, 1921. Oil on canvas, 142.9 x 172.7 cm. Art Institute of Chicago, no. 1954.270. © Estate of Pablo Picasso/ARS, NY.

In the Art Institute of Chicago's *Mother and Child* by Picasso (Fig. 1), we might ask: "Why is the child reaching up?" Picasso had begun the painting with three figures, a mother, father, and child, representing himself with Olga and Paolo, but cut off the left portion containing his own image. Picasso gave a museum trustee the missing fragment, and an x-radiograph readily revealed his missing left arm.[3]

There is currently a public stir about whether talented Old Masters actually relied heavily on optical devices such as the *camera lucida* or *obscura*. In any case, Jorgen Wadum, head conservator of the Mauritshuis, showed that to construct perspective, Vermeer used the current practice of the day – inserting a pin with a string attached to it at the vanishing point to create orthogonal lines.

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[1] See Maryan Ainsworth, *Art and Autoradiography: Insights into the Genesis of Paintings by Rembrandt, Van Dyck, and Vermeer* (New York: The Metropolitan Museum of Art, 1983).

[2] See Gridley McKim-Smith, *Examining Velasquez* (New Haven: Yale University Press, 1988).

For his study of Caravaggio, Keith Christiansen (another regular curatorial visitor to conservation departments) studied a large number of paintings in raking light, as well as with x-radiographs and infrared, and consistently found incisions in the painting that had been drawn free hand, indicating a general placement of the figures that was adjusted in the final painting.

A number of artists in the 20th century varied the surface gloss of their paintings locally for topographical effects. Sadly, many of these effects were later lost by overall varnishing. This could have been avoided if conservators and art historians had worked together. Ann Hoenigswald, conservator at the National Gallery, has studied Russian artist Kasimir Malevich and provided superb visual documentation of his use of local gloss and varnishes.

The Kirsh-Levenson book documents the tragedy of the Mark Rothko Harvard Murals of 1962. The lithol red faded from Harvard Crimson to blue due to prolonged exposure to high levels of unfiltered natural light.

Other changes can be subtler. A joint conference of British art historians and the United Kingdom Institute for Conservation was held at the Tate Gallery in London in 1990. The cover of the book of this conference (*Appearance, Opinion, Change: Evaluating the Look of Paintings*) showed a detail from the 1890 Vincent Van Gogh mixed media work *The Oise at Auvers*. The rabbet edge of the frame had protected a red lake in the sky from fading; a tiny strip of the original color of the sky is still visible across the top, providing a tantalizing hint of how the painting once appeared.

Conservators in Britain, especially at the National Gallery, London, have been leaders in a new field called "technical art history." In the 1990s, under the directorship of Neil MacGregor before he left for the British Museum, two marvelous series of collaborative books were published. The *Art in the Making* series accompanied exhibitions on Early Italian paintings, Rembrandt, and the Impressionists. Another series, entitled *Making and Meaning*, featured at least five joint art-historical-conservation ventures illuminating the efforts of the artist of *The Wilton Diptych, The Young Michelangelo, Turner: The Fighting Temeraire, Rubens's Landscapes,* and *Holbein's Ambassadors.*

Ernst van de Wetering, an art historian who has worked on the Rembrandt Research Project in the Netherlands for over 30 years, who is a "three-legged stool" all by himself, is completely at home with visiting the conservation laboratory. He has worked with the Amsterdam "Molart" team (molecular studies of works of art) and seamlessly incorporated technical findings into the visual results for his book *Rembrandt: The Painter at Work.*[4] This book represents an extraordinary case study for passionate writing compellingly combined with technical data.

More is now happening in the United States. A conservator and an art historian, H. Travers Newton and Vojtêch Jirat-Wasiutyenski, have collaborated on *Technique and Meaning in the Paintings of Paul Gauguin (*Cambridge University Press, 2000). One of their earlier joint discoveries was that the odd overpaint on the Van Gogh *Self-Portrait Dedicated to Gauguin*, 1888, had actually been applied by Gauguin. It was therefore not removed, and bears physical witness to the history of the relationship of the two artists.

Harry Cooper, art historian and curator at the Fogg, and Ron Spronk, technical art historian in the Straus Center for Conservation at Harvard, have studied seventeen paintings that Piet Mondrian began in Paris before World War II and finished in New York City, where he lived until his death in 1944. After arriving in Manhattan, the artist began reworking, digging, and scraping away bits and pieces of paintings that had been completed and exhibited years earlier, in order to remove old design

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[3] See Andrea Kirsh and Rustin S. Levenson, *Seeing Through Paintings* (New Haven: Yale University Press, 2000), pp. 55-54.

[4] Ernst van de Wetering, *Rembrandt: The Painter at Work* (Amsterdam: University Press, 1997).

elements and add new ones, sometimes slightly altering the width or position of a line, sometimes radically altering the composition. Mondrian told Sidney Janis in 1941 that the new color elements gave his painting "more boogie-woogie." Spronk and Cooper have used x-radiography, magnification, and infrared imaging to delve into the artist's working process. Together they have produced an exhibition, a publication, and a Website.[5]

In 1990 The Art Conservation Department of the University of Delaware welcomed our first students into a Ph.D. program in art conservation research. One of the goals of the program was to inspire conservators to carry out research fully informed by both art history and science. Susan Lake, conservator at the Hirshhorn Museum, recently completed her doctoral degree. She has worked (in collaboration with Judith Zilczer, curator [since retired], and Gordon Nicol, scientist) on the techniques of Willem de Kooning. She wrote in her dissertation that for his gritty New York paintings of the 1940s, to help with the illusion of torn and dirty billboards, the artist added actual dirt and grit to the surface of the painting, dirt that a conservator should NOT remove. For his pink, foamy seaside paintings of women in the 1960s, de Kooning would sometimes whip water or safflower oil into the paints. This technique would cause tiny popping bubbles or circles in the paint film, imitating the water on the sand in the Hamptons. However, this same technique could sometimes cause the paint never to dry entirely, but to remain tacky, still sticking to glassene paper or drinking in atmospheric dirt thirty years later. Knowing this ahead of time can help both worlds – the curator who has to decide whether or not to lend the painting, and the conservator who with this knowledge can design a special travel case with a plexi-glass top so that no glassene has to touch the still tacky surface. Another one of our Ph.D. graduates, E. Carl Grimm, wrote a dissertation on fruitful approaches to the attribution problems for the artist Albert Pinkham Ryder.

I hope it is evident that I am an enthusiastic advocate for the collaboration of conservators and art historians. Many passions are based on some past shame or secret. Here is mine. Twenty-seven years ago, during my advanced postgraduate internship following my conservation training at New York University's Conservation Center, I was instructed to fill and inpaint many tiny pinholes on a Matisse; my supervisor thought the tiny holes might have been caused by a vandal. Later at a conference in Oberlin, I learned from a lecturing art historian that Matisse typically pinned working drawings directly to his canvas while making decisions about his compositions. The pinholes were part of the artist's working process, and I see them often on other paintings by Matisse – each burns a hole in my psyche. Luckily, what I did is readily removable, or "reversible," as required by our conservation code of ethics.

I have been pleased to advise with catalogues raisonnés wherever possible. Christine Podmaniczky (who is attending this conference) is working on the catalogue for American artist N. C. Wyeth in cooperation with the Brandywine River Museum. In 1998, one of our advanced conservation graduate students treated an N. C. Wyeth study for a family mural in the BRM collection and, with the aid of x-radiography, found an illustration from *Everybody's Magazine,* 1919, below. Podmaniczky had been seeking this missing dynamic painting of two men fighting and learned from our student's work that it was in her museum collection all along.

Conservators may also be helpful on the compilation of the catalogues of contemporary artists, because we also may have advised or interviewed the artists about their techniques. Our Winterthur paper conservator, Betty Fiske, served as the personal curator to Robert Motherwell and interviewed him about his techniques and materials; he had bought back and destroyed one of his own paintings that he felt had been ruined by unwelcome varnishing. Fiske has unique knowledge about Motherwell that could be of great use to future art historians.

The paintings conservation studio of Winterthur Museum, where I teach for the University of Delaware, is about fifteen minutes away from the studios of Andrew and Jamie Wyeth. I have advised both artists about materials, carried out treatments for their paintings and paintings by other artists that they collect, and have involved our conservation graduate students as often as possible in these collaborations. We try in our Winterthur/University of Delaware graduate program to train conservators who will be helpful to both artists and art historians and who will avoid my Matissean mistake through collaboration with art historians, artists, or regular visits to works of art in museums. We have over 200 graduates from Los Angeles to the Rijksmuseum, many of whom would be pleased to enter research partnerships with art historians. I hope my words may pique your interest enough to visit and get to know the conservator nearest you.

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[5] See Harry Cooper and Ron Spronk, *Mondrian: The Transatlantic Paintings* (New Haven: Yale University Press, 2001).

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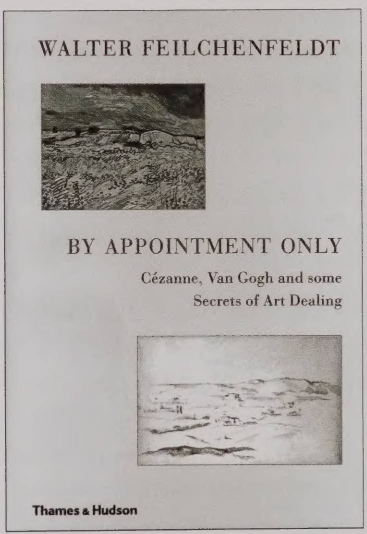
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Kelly Devine Thomas, ARTnews, Summer 2006

PROCEDURES AND PROCESS Q&A

NANCY MOWLL MATHEWS, MODERATOR (NM)
NEIL PRINTZ (NP)
SARAH FAUNCE (SF)
VIVIAN ENDICOTT BARNETT (VB)
JOYCE HILL STONER (JS)

Q **NANCY MOWLL MATHEWS:** In working with a committee, have you ever not been able to resolve the authenticity issue, and remained with differing opinions?

A **VB:** To date, fortunately, we have not had any disagreements on the Kandinsky paintings committee. In terms of the catalogue raisonné of the watercolors, I essentially authored it without a committee. If I had any questions at all, I involved the committee of the Société Kandinsky, and so far, we have all agreed.

NP: We have three letters of opinion. One says, "It is our opinion that the work is by Andy Warhol." The second letter says, "We do not think it is a work by Andy Warhol." And, of course, there is the third letter, which addresses our doubt, and that's a very real and reasonable doubt: "We cannot come to an opinion at this time." That does happen, and it needs to be acknowledged. We do not like to do it often, but . . . where there are disagreements or different readings of the work, we do it because we cannot give [an opinion] with confidence.

NM: For the Prendergast catalogue, there was only one time when we could not agree as a group. Our solution was for each of us to write our own letter and have it stand as our personal opinion.

> "We have three letters of opinion. One says, 'It is our opinion that the work is by Andy Warhol.' The second letter says, 'We do not think it is a work by Andy Warhol.' And, of course, there is the third letter, which addresses our doubt, and that's a very real and reasonable doubt: 'We cannot come to an opinion at this time.'"

Q I have published two catalogues raisonnés. I had a problem with works on paper that were so faded I wondered whether they were still authentic. Also, what is the cutoff point when oil paintings are heavily restored? I would like to have your thoughts.

A **JS:** One paper conservator refers to this situation as "flat lining," that is, the life of the paper object has simply come to this state. One of the things conservators have tried to do with works that have been in a fire or have been very repainted is ask: "Is it still acceptable to Jackson Pollock?" or some other artist. The best thing that I can suggest at this conference is that you form a committee with a lawyer, the artist's wife, the conservator, the scientist, the curator, so that all can agree. You may have to send the work back and say, "Due to the following reasons this should not be considered an authentic work."

NM: Your question relates to many situations where a work of art is either damaged by time or circumstance or, either consciously or unconsciously, has become a "collaborative" work over the years. To what extent can you say that it is by a certain artist? I guess our conclusion is that as long as something visible remains of the artist to whom the work is attributed, that artist's name should be on it in some way. But unfortunately, one of the problems with cataloguing and recording is that you ultimately have to come up with a sound bite - it has to go under some artist's name. You try to maximize the sound bite so that all the circumstances are made known. You have a work by so-and-so over a drawing by somebody else, or a work by so-and-so destroyed and consequently restored by so-and-so. Just to get all of the circumstances out on the table.

NP: If you have a work, even a disfigured work, that is what you have to address. Its disfigurement or its changes are recognized as that. But you still have the historical fact of the work. I do not think authenticity is about reasoning the work. Is the work there? Something may have happened to it, but is it still there? Those are the questions to ask.

JS: I would like to add a note about older works that have been transferred in entirety. The National Gallery in London is the leader in that area. It is so good about saying when a work has been transferred and, therefore, that you are not seeing the original surface when, for example, you see pockmarks. This brings us to the issue of making it clear not only when the art work is in terrible condition, but also when it is in excellent condition. That way you can see if your tuning fork works; when works are in such excellent condition, you can set your clock by them. This helps you understand how far off the damaged ones are. . . .

Q A painting was submitted to my catalogue raisonné committee as an example of the artist's work. The back of the stretcher had the number of an illustration, which matched a number in the artist's daybook, or studio catalogue. But the picture in the studio catalogue was different from the one on the canvas. When we looked carefully at the painting, however, we could see what we thought was a second painting, barely visible at the edges. What standards are necessary in order to call this two paintings, and include that fact in the catalogue raisonné?

A **NM:** That would be hard to answer without knowing more about the circumstances.

VB: In fact, it depends on the visual evidence, what the painting looks like. An artist, like any other person, can make a mistake and write the wrong number on the back of the stretcher. That the image does not match up with the number is quite common, but there are also other possibilities. Some artists take an authentic work off a stretcher and mount something else on it, which then leaves merely an original stretcher with a number. So there are lots of options.

Q It is clear that the catalogues raisonnés of Noguchi and Warhol are funded by foundations, but is the Kandinsky catalogue raisonné funded by a museum or by the Société Kandinsky, and is it a foundation? Also for Courbet. I ask because your procedures – flying around to international exhibitions – sound truly ideal, but they are perhaps beyond the grasp of many catalogue raisonné budgets.

A **VB:** The budget for the Kandinsky catalogue raisonné of watercolors came from a restricted fund at the Guggenheim Museum set up by the Blue Rider Research Trust, which had paid for the two-volume catalogue raisonné of the paintings. Other donors also gave money. The catalogue raisonné of drawings is being done in Munich at the Lenbachhaus. The Société Kandinsky is interested

NANCY MATHEWS, MODERATOR (NM)
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in helping sponsor it. Travel to the meetings for the Société Kandinsky is reimbursed, but the members are not paid for their work. I think that funding comes from various sources for most of these projects, including grants.

Q I was really interested in how objective the Société Kandinsky is. Most of the panelists seem to have funding for their projects. I wonder about a private scholar. When someone wants the scholar's opinion about a work, is it legitimate for him to ask for a fee with the understanding that he will give his honest opinion, positive or negative? Or would that be considered inappropriate?

A **NM:** That's a question to which there may be many different answers.

VB: I don't take a fee from people who approach me . . . I am an independent art historian. My work is paid for by museums, not by the owners of works of art, not by collectors. . . .

NM: My case is similar in that the original funding for my catalogue came from the artist's estate and an endowed position at Williams College, which pays for my continuing research and related costs.

SF: My research for the Courbet catalogue project is set up as an independent, tiny, nonprofit organization that is privately funded. I have a contract that funds me and covers all my procedures, spelling out what I will and will not do. The owners understand the consequences . . . that information will not go beyond me. There are other stipulations that make it possible for me to work as an independent scholar, study the evidence, and draw conclusions.

NP: I don't take fees at all. I don't offer opinions on the authenticity of a work. I serve under a board and a committee, for which I receive a small honorarium. I'm always delighted to talk to scholars, to share information. I thoroughly believe in the free flow of intellectual information . . . I serve on a committee that's specifically set up to deal with authenticity in a very regular, formal manner. I believe it's the appropriate way for what we're doing.

I also don't comment on my research in progress, since research continually changes . . . . I don't mean only regarding authenticity. I mean even, "How many were made?" That happens all the time, because everyone thinks Warhol's *oeuvre* is infinite. I refer people to the published literature. I tell them that until I finish my work, I don't know. I do not want to give misinformation. And I also do not want to advise people to buy and sell a work. I am not a market regulator, and I am not a policeman. We have a board, a committee, to behave very responsibly with respect to the artist's work. . . . I think it protects everybody . . . Regarding the question that Sharon Flescher brought up earlier, the tension between the market and the ivory tower, I don't think it's tension; we interact constantly, but there is a pressure from the market. I try not to consider it pressure, and I think everyone at this panel feels the same way . . . .

A **SF:** There are occasions when you do become more closely involved in the market. For example, the Fall 2001 sale at Sotheby's had the fourth Courbet *Portrait of Jo* in it. I had been studying that situation more than anybody has ever studied it. There was a lot of misinformation both in the old catalogue raisonné and in the current material that the son of the author of that catalogue has. I feel very strongly about this, and I was willing to speak . . . I had done quite a lot of research and study. . . . It had nothing to do with the exchange of money.

SHARON FLESCHER: The subject of fees will come up again in this conference. But perhaps we can make a distinction between the individual scholar whose opinion is sought for authentication and the scholar who is on a catalogue raisonné committee or working on a catalogue and is asked to review a work for possible inclusion in that catalogue.

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WHO JUDGES THE EXPERTS?

GRACE H. GLUECK, MODERATOR
PETER C. SUTTON
JOHN L. TANCOCK
VAN KIRK REEVES

INTRODUCTION

GRACE H. GLUECK*

The concern with authentication is almost as basic to the practice of art history as looking at pictures. In recent years with the soaring prices and the avid collector interest, there may be a more compelling need to establish the authenticity of art works. The increasing sophistication of art scholarship, along with the availability of rigorous new scientific techniques, have made it more possible. Given the time that separates most art works from the present, the tendency to restore and repaint them over the centuries, and the propensity of many artists to assign work to assistants and disciples, it is small wonder that there is still an abyss of uncertainty in the field.

> **"Connoisseurship sets great store on the deep response of mind and eye that results from taste, training, and long exposure to originals."**

At best, expertise remains a consensus of the opinions of reputable scholars. Experts themselves often don't agree on who is an expert, but they agree that the prime ingredient of expertise is connoisseurship – the ability to examine a work of art and to be able to propose, without other aids, such factors as its period, its aesthetic importance, its relationship to other works, and who might be the author. Connoisseurship sets great store on the deep response of mind and eye that results from taste, training, and long exposure to originals. I'm reminded here of a story for which I'm indebted to Ronald Spencer, a lawyer and conference participant, who has had much familiarity with authentication processes. It seems that once someone showed the painter James McNeill Whistler an alleged Velasquez. He dismissed it immediately, and when the owner protested his quickness to negate, he said "I always swoon when I see a Velasquez."

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* Grace Glueck is an art critic for *The New York Times* and author of "The Great Experts," *ARTnews*, September 1992, pp. 90-101.

> **"Such expertise is, of course, open to abuse since, occasionally, authenticators have been known to profit by their opinions."**

Most art experts don't swoon, and in the scholarly and museum worlds, expertise is often done very informally on an in-house basis. But in the art market, the expert has a different status; his opinion is equally sought to promote sales. There is a whole core of authenticators – some specializing in individual artists, some in periods of art – on whose certification, in one form or another, dealers and auctioneers rely to sell works. Such expertise is, of course, open to abuse since, occasionally, authenticators have been known to profit by their opinions. Although never actually accused of tailoring an opinion to fit a fee, Bernard Berenson, the leading authority of his time on Italian Renaissance painting, was known to have had murky financial arrangements with Joseph Duveen and other dealers. In general, the authenticators consulted by reputable dealers and auction houses (often staffed with experts themselves) are responsible scholars, some highly esteemed, who are willing to put their names to their opinions. Auction houses often consult; informally, museum people do too. Some people, however, have difficulties with the idea of museum expertise, in particular, the curator who has done an exhibition on someone and then *de facto* becomes the expert. Dealers, too, can serve as experts. Those who have long familiarity with the artists they handle cannot be dismissed as authenticators. Dealers, in fact, are often the publishers of catalogues raisonnés. This practice is criticized as being potentially rife with self-interest, since combing the field to see which works are where gives dealers access to potential sellers and buyers. What is more, they can validate the work they sell by including it in the catalogue raisonné. But it is also true that dealers can best stand the high cost of such projects and very often hire highly respected, reputable scholars to do the work.

Now to our panel, "Who Judges the Experts?"

• • •

JUDGING THE EXPERTS

PETER C. SUTTON*

The subject is "Who Judges the Experts?" Obviously, the answer is a jury of their peers; individuals with what is known as a good "eye," or connoisseurs. I was struck by something that Sam Sachs said: How rarely we actually have a thorough and exhaustive review of the catalogue raisonné process. That has certainly been the case in Old Master paintings. In 1972, I proposed to my thesis advisor that I do a monograph with catalogue raisonné on Pieter Lastman, the teacher of Rembrandt. I completed an M.A. thesis on the subject and then was told that a German scholar was working on Lastman, so I should step aside. I did so. Alas, the catalogue raisonné on Lastman has still not appeared more than thirty years later. So sometimes it may be best to risk redundancy in the interest of gaining more than one point of view. One case of duplicated effort had a wonderful outcome, namely the two studies of Andrea del Sarto, who was honored with catalogues raisonnés by both John Shearman and Sydney Freedberg.[1] It brought the artist into much sharper focus to have two quite different approaches with independent points of view.

The same could be said of the work that has been done on Frans Hals by Seymour Slive and Claus Grimm, two very different approaches that have brought special insights into the parameters of the artist's *oeuvre*.[2] There are other cases, such as van Dyck. The catalogue raisonné done by Erik Larsen some years ago is, frankly, so marred with misattributions and works by copyists and studio that it is all but useless.[3] It was never reviewed in any thorough way, but it was the subject of a discussion in the *Print Collectors' Newsletter* between two very discreet and decorous gentlemen, John Walsh and Julius Held, who concluded that this work was so bad, indeed so compromised, that it set back scholarship and should never have been published at all.[4]

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[1] John Shearman, *Andrea del Sarto* (Oxford: Clarendon Press, 1965); Sydney J. Freedberg, *Andrea del Sarto* (Cambridge: Belknap Press of Harvard University Press, 1963).

[2] Seymour Slive, *Frans Hals*, 3 vols. (London: Phaidon Press, 1970-[74]); C. Grimm, *Frans Hals: das Gesamtwerk* (Stuttgart: Belser, 1989).

[3] Erik Larsen, *The Paintings of Anthony van Dyck*, 2 vols. (Freren: Luca, 1988).

[4] Thomas Fels, "Student & Teacher: an Interview with John Walsh and Julius Held," *Print Collector's Newsletter*, XXI, 5 (November-December 1990), p. 171.

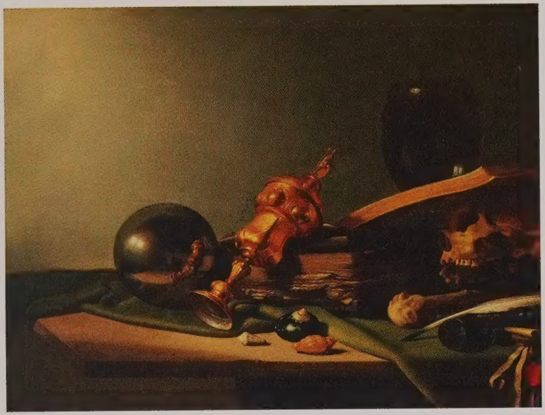

FIGURE 1. After Pieter Claesz (Dutch, 15th century). *Vanitas Still Life*, c.1634. Oil on panel. 21 1/4" x 28 1/8". Inv. no. 70.PB.37. Courtesy of the J. Paul Getty Museum. Painting identified by Vroom as by Pieter Claesz or Clara Peeters.

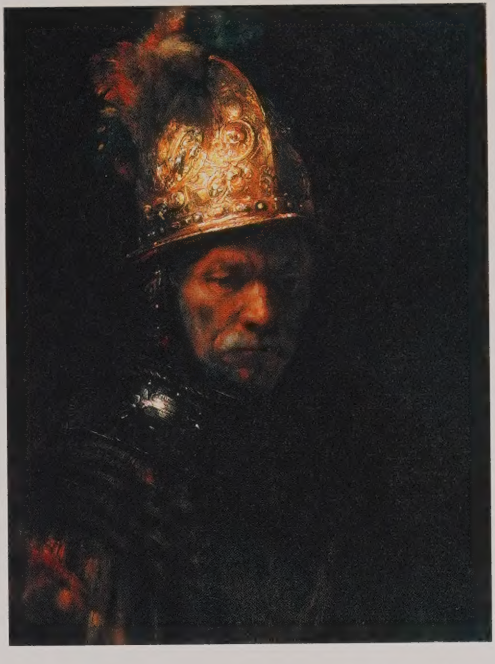

FIGURE 2. Rembrandt, Circle of. *Man with the Golden Helmet*. Oil on canvas. 67.5 x 50.7 cm. Inv. 811 A. Property of the Kaiser-Friedrich-Museums-V. Location: Gemäldegalerie, Staatliche Museen zu Berlin, Germany. Photo: Joerg P. Anders. Photo Credit: Bildarchiv Preussischer Kulturbesitz / Art Resource, NY.

Some years ago N. R. A. Vroom wrote *Monochrome Banketje*, which is about the beginning of naturalistic still-life painting in Holland.[5] In this book he tried to make some sense of the *oeuvre* of Pieter Claesz. But Vroom had a great deal of trouble distinguishing between Claesz and Clara Peeters, another important early master of still-life painting. Part of the problem was that the artists had the same initials in reverse – PC and CP – so their monograms could be confused. He lumped together no less than twenty pictures that he attributed to "either" Pieter Claesz or Clara Peeters, such as the still life in Figure 1. There was another catalogue raisonné that came out on Clara Peeters, which solved some of the attribution problems.[6] But it also contributed to the confusion about the artist because the author evidently did not understand the system of abbreviations on the mats of the photographs in the RKD [Rijksbureau voor Kunsthistorische Documentatie] – the photothèque in The Hague that is the best research facility on Dutch artists. When the RKD doesn't know where a picture is located, it writes "UBI" for its location. Unfortunately, this individual thought UBI was some place in Russia. As a consequence, there is now an anonymous "Ubimaster" who works in the style of Clara Peeters. We now have a new catalogue raisonné on Pieter Claesz by Martina Brunner-Bulst, a German scholar who was working on the artist for many years.[7] We would regularly consult her on Pieter Claesz when I worked at Christie's.

> **"He lumped together no less than twenty pictures that he attributed to 'either' Pieter Claesz or Clara Peeters."**

Christie's and Sotheby's both have a list of experts that they consult. These experts need not be published; they are people who simply are known to have worked assiduously on individual artists. It is a credit to the integrity of the auction houses that they often will consult the expert and cite their opinion, but then downgrade the attribution if they

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[5] Nicolaas R. A. Vroom, *De Schilders von het Monochrome Banketje* (Amsterdam: Kosmos, 1945).

[6] Pamela H. Decoteau, *Clara Peeters* (Lingen: Luca, 1992).

[7] Martina Brunner-Bulst, *Pieter Claesz: die Hauptmeister des Haarlemer Stillebens im 17. Jahrhundert: kritische Oeuvrekatalog* (Lingen: Luca, 2004).

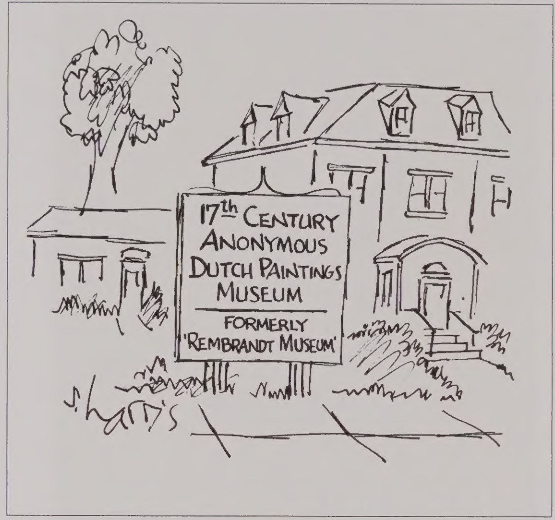

FIGURE 3. Sidney Harris, cartoon, "Anonymous Dutch Paintings Museum," *Artist's Magazine*, 1986. © ScienceCartoonsPlus.com

disagree with the expert, even though it might result in a higher sale price if the picture were attributed without qualification. This is another way that the marketplace meets the ivory tower.

Perhaps the most famous case of connoisseurship whittling away at the *oeuvre* of an artist is that of Rembrandt. The most notorious example was, of course, *The Man with the Golden Helmet*, once one of the most famous Rembrandts in Berlin, which when it was downgraded caused an uproar (Fig. 2). The controversy and commotion that the reattribution of the Rembrandts created, especially in the 1980s, was satirized in a cartoon that ran in those years (Fig. 3). The Rembrandt Committee has made wonderful contributions to enhance our understanding of Rembrandt. They did so in part by consulting scientific evidence – technical analysis. The prefaces to the first two volumes of the Rembrandt Research Project, however, admit that they were surprised and even a bit disappointed that scientific evidence did not offer a touchstone of proof to reattribute pictures.[8] Technical information could demonstrate that a painting was out of period or inconsistent

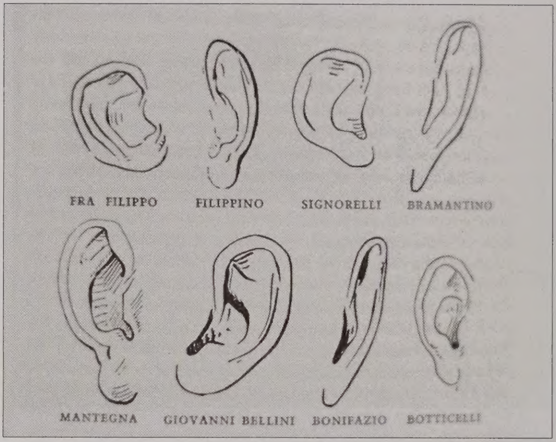

FIGURE 4. A page from Morelli showing earlobes.[9]

with the master's techniques and materials, but could not determine whether a work was by Rembrandt or by a pupil or follower. What they had to fall back on was, of course, connoisseurship.

The second volume of the Rembrandt Corpus is particularly interesting in explaining the Team's working methods and practices. It sought to explain how their system of connoisseurship worked, citing historical precedents for their approach, especially in the work of Giovanni Morelli. Morelli was a nineteenth-century Italian patriot who was one of the most gifted connoisseurs of his day. He sought to dispel connoisseurship's association with inexplicable knowledge and legerdemain, arguing that it could be a scientific discipline. In practice, Morelli's method involved exploiting something like the pictorial equivalent of a Freudian slip. (Freud, by the way, was probably influenced by Morelli, but that's another story.) Morelli illustrated his books and catalogues with schedules of seemingly trivial details recorded in line drawings derived from great mas-

"When the RKD doesn't know where a picture is located, it writes "UBI" on it for its location. Unfortunately, this individual thought UBI was someplace in Russia. As a consequence, there is now an anonymous "Ubimaster" who works in the style of Clara Peeters."

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[8] Josua Bruyn, et al., *A Corpus of Rembrandt Paintings*, 4 vols. to date (The Hague and Boston: M. Nijhoff, 1982-2005).

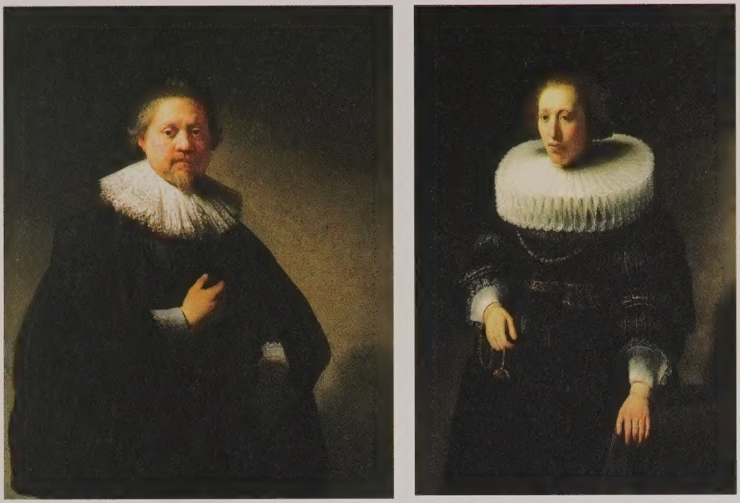

FIGURE 5A & B. Rembrandt, *Van Beresteyn Portraits*, 1632. Oil on canvas, 44" x 35" (111.8 x 88.9 cm). The Metropolitan Museum of Art, H. O. Havemeyer Collection, Bequest of Mrs. H. O. Havemeyer, 1929 (29.100.3 and 29.100.4). Photographs © The Metropolitan Museum of Art.
Attribution to Rembrandt questioned by the Rembrandt Committee.

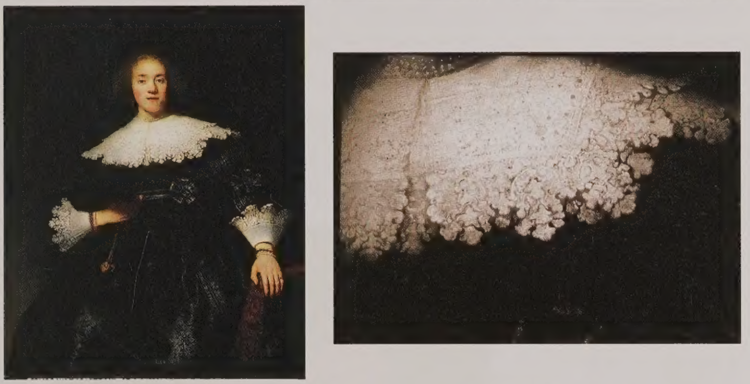

FIGURE 6 A & B. Rembrandt, *Portrait of a Young Woman with a Fan*, 1633. Oil on canvas, 49 1/2" x 39 3/4" (125.7 x 101 cm) and Detail of the lace collar. The Metropolitan Museum of Art, Gift of Helen Swift Neilson, 1943 (43.125). Photograph © The Metropolitan Museum of Art.

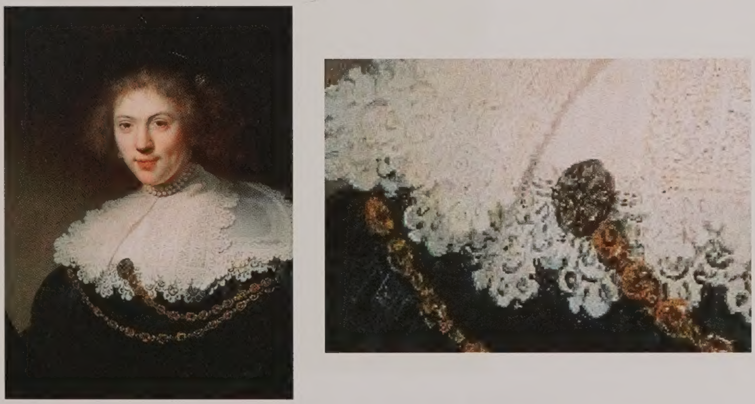

FIGURE 7A & B. Rembrandt, *Portrait of a Woman Wearing a Gold Chain*, 1634. Oil on panel, 27 3/8" x 20 7/8" (69.5 x 53 cm) and Detail of the lace collar. Museum of Fine Arts, Boston, no. 93.147.4. Gift of Mrs. Frederick L. Ames. Attribution to Rembrandt questioned by the Rembrandt Committee.

ter's paintings, such as earlobes and fingertips (Fig. 4). He argued that it was in these seemingly insignificant details, which the painter executed in an automatic and almost unconscious way, that revealed his true identity – rather like a person who unconsciously but very characteristically uses a certain personal turn of phrase in conversation. Unlike the most important and salient parts of the picture, such as the face, it was in these minor details that the pressures of stylistic convention were relaxed and the painter revealed himself.

The members of the Rembrandt Research Project, in turn, selected for their indicators of a work's autograph status details of the collars and lace cuffs in Rembrandt's portraits of the early 1630s. It was their assumption that the way in which these lesser details were executed (for example, how the decorative patterns were treated and the scalloping of the lace was handled) would reveal the master's true handwriting. Applying these stylistic touchstones rigorously, the Committee disattributed more than a few pictures that had always been accepted as by Rembrandt. Among the most famous is the pair of *Van Beresteyn Portraits* in the Metropolitan, which, notwithstanding the Team's doubts, are still assigned unconditionally by the Met to Rembrandt today[10] (Figs. 5A & B).

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[9] Giovanni Morelli, *Italian Painters: Critical Studies of their Works*: trans. C. J. Foulkes (London: J. Murray, 1892), p. 78.

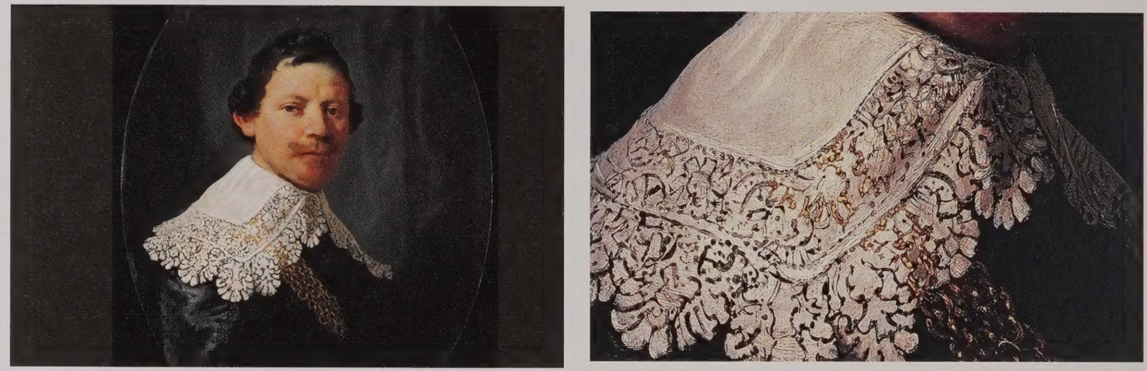

FIGURE 8 A & B. Rembrandt, *Portrait of Philips Lucasz*, 1635. Oil on wood, 79.5 x 58.9 cm, and Detail of the lace collar. National Gallery, London, no. 850. © The National Gallery, London.

To judge the judges back in 1986, when the second volume of the Corpus came out, we quietly convened a meeting at the Museum of Fine Arts, Boston. We assembled eight or ten paintings that had been catalogued in the second volume or were related works from the Metropolitan, the Museum of Fine Arts, Boston, and the Isabella Stewart Gardner Museum. These were gathered in the lab, and we invited senior staff members of the Met and the MFA, local scholars, specialists in Dutch painting, as well as two members of the Rembrandt Research Project (RRP). We had a wonderful day, one of the most memorable and stimulating I have ever experienced as a curator and art historian. We ultimately concluded that we would have to agree to disagree because we could not resolve all the attributions to the satisfaction of general consensus. But it gave us an opportunity to look at these works very, very carefully, to test the premises upon which the reattributions were based. I, for one, agreed with the Met's curators, who did not feel that the Van Beresteyn portraits, albeit very different sorts of individuals, were by a different hand than their own *Lady with a Fan* (Figs. 6A & B), whose attribution to Rembrandt had been upheld by the RRP. I also found myself defending the pair of oval portraits in the MFA that had also been downgraded (Fig. 7 and its pendant, no. 93.1475). Far from serving as a reason to reject them, I found the dazzling execution of the woman's lace collar, the delicious way in which he had rendered the lobes of the collar, all the more persuasive in upholding the attribution to Rembrandt. And it seemed clear that rather than being one of the least interesting details of a bust or half-length portrait, passages of lace offered the artist a fascinating challenge to convey their intricacy; rather than painting them in a single mechanical style, one could well imagine the master **ringing** the stylistic changes on lace collars in different portraits. In fact the treatment of the

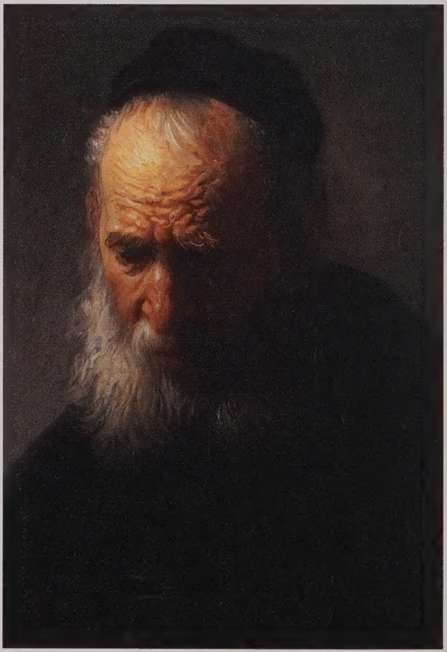

FIGURE 9. Rembrandt. *Head of an Old Man in a Cap*, c.1630. Oil on panel. Collection of the Agnes Etherington Art Centre, Queen's University, Kingston, Canada. Gift of Drs. Alfred and Isabel Bader, 2003. no. 46-031. Previously downgraded by the Rembrandt Committee, but now accepted as a Rembrandt.

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[10] See the Metropolitan Museum's Website, which states that the *Van Beresteyn Portraits* are by Rembrandt, and that the Rembrandt Committee's hypothesis is "almost universally rejected."

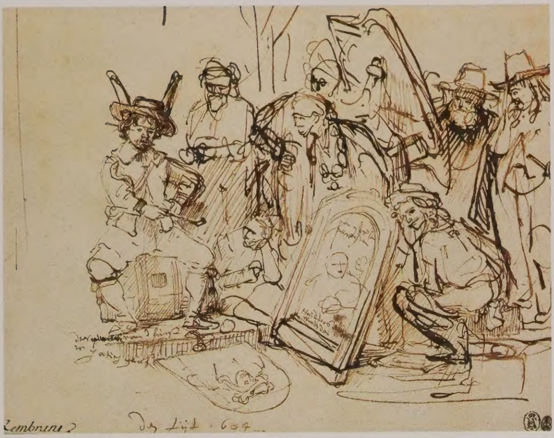

FIGURE 10. Rembrandt. *Satire on Art Criticism*, 1644. Pen and brown ink corrected with white, 6 1/8" x 7 15/16" (15.5 x 20.1 cm). The Metropolitan Museum of Art, Robert Lehman Collection, 1975 (1975.1.799). Photograph © The Metropolitan Museum of Art.

lace in the *Lady with the Fan* (Fig. 6B) is comparable, though creatively varied, to that of the *Portrait of a Woman wearing a Gold Chain* (Fig. 7B).

The dangers of relying on rigid systems are illustrated by another of the RRP's attributions. The Committee concluded that the *Portrait of Philips Lucasz* at the National Gallery in London (Figs. 8A & B) was by Rembrandt, but since the lobes of the collar were painted so freely, that the collar must be by an assistant.[11] But the overall effect is cohesive, indeed masterful, and details of the treatment of the lace again bear comparison with the *Woman with a Gold Chain* and *The Woman with the Fan*. A restrictive or compartmentalized approach to connoisseurship thus does not permit the sort of creative liberties that a painter of Rembrandt's invention was undoubtedly capable of taking.

It is fascinating to read the article that Ernst van de Wetering published in *IFAR Journal*,[12] which states clearly that there are very few cases where the Team can be absolutely certain about the attribution of a picture. One of the reasons why the Rembrandt Research Committee changed to a new format was that they felt its ABC system of "accepted," "questionable," and "rejected" paintings was too rigid. To their credit, the Rembrandt Research Committee has changed its mind several times recently and shown much greater flexibility. For example, the *Head of an Old Man in a Cap* (Fig. 9) [formerly] owned by Dr. Alfred Bader was once rejected and now has been accepted.[13]

"It is surely a healthy idea to accept the notion that connoisseurship and catalogues raisonnés are organic: we are permitted, indeed expected, to occasionally change our minds as our knowledge and information grows."

It is surely a healthy idea to accept the notion that connoisseurship and catalogues raisonnés are organic: we are permitted, indeed expected, to occasionally change our minds as our knowledge and information grows. Of course, Rembrandt knew this well and was very suspicious of the lay experts. One of his drawings in the Lehman Collection, *Satire on Art Criticism*, shows a connoisseur (with donkey's ears) analyzing a picture (Fig. 10). In the seventeenth century, artists were regarded as the last authorities on disputed works of art and were always consulted when questions arose about what was autograph. The artists arrayed around the critic in Rembrandt's drawing have little respect for the lay connoisseur; indeed, one of their number (lower right) defecates on the floor out of sight of the critic. With uniquely Dutch candor, Rembrandt couldn't be more straightforward about his opinion of the views of the connoisseur. Perhaps we should return all questions of attribution to their original arbiters, the artists.

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[11] See Corpus, *op. cit.*, Vol. III, pp. 175-82 (A 115) for the discussion of the *Portrait of Philips Lucasz*.

[12] "Thirty Years of the Rembrandt Research Project: The Tension between Science and Connoisseurship in Authenticating Art," *IFAR Journal*, Vol. 4, no. 2, 2001, pp. 14-24.

[13] *A Corpus of Rembrandt Paintings*, vol. I, pp. 576-80 (C 22) rejected the work, but Vol. IV, p. 628, (I C 22 / Br. 633), corrects the earlier opinion. In 2003 the painting was donated by Dr. Bader to the Agnes Etherington Art Center at Queen's University, Kingston, Ontario.

THE VIEW FROM THE AUCTION HOUSE

JOHN L. TANCOCK*

When I first started working at Sotheby's in 1972, everything was very much smaller – not only the building, but the staff as well. As I recall there was one in-house attorney, one person in the press office, and a significantly smaller number of people in the departments where I worked, initially the Contemporary Department and then the Impressionist and Modern Department. The cataloguing could be rudimentary. On October 25, 1982, for example, a painting by Claude Monet – *Les Glaçons* – was included in the sale. The only information given, apart from the size, was that it was painted in 1888.

Likewise with a Renoir consigned by the Metropolitan Museum of Art, *Maisons à Cagnes*, painted circa 1912. Since the relevant volume of the Wildenstein catalogue raisonné on Monet had not yet been published, and since the same was true of François Daulte's Renoir catalogue raisonné – in fact, it has *still* not been published – we included no references to provenance, literature, or exhibitions. Furthermore, I do not recall that any attempt was made to acquire more information.

> **"Since . . . our decisions have financial ramifications, Sotheby's has to form its ow opinion of the qualifications of the expert who is adjudicating the fate of a work. How much confidence do we have in his or her scholarship and 'eye'?"**

It is very different now. We would not be taken seriously if we were that concise in our cataloguing! Of course, a large number of significant catalogues raisonnés have been published in the last thirty years, and many of the works included in the major Impressionist and Modern sales are now published. This is not to say that the appearance of a major catalogue raisonné is necessarily the end of the story, as I will

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> “At their best, catalogues raisonnés speak with great authority. . . . There is perhaps a natural tendency to take this authority at face value, but that can be a mistake.”

show later. However, it can safely be said that there now seems to be an “expert” for nearly every artist. In my office we work from a long list, nearly eighty pages in length, of the current authorities on every artist from Jankel Adler to Frederico Zandomeneghi by way of Chagall and Picasso, as well as some with whom I am barely familiar.

There are all types of authorities on this list. There are internationally recognized scholars and academics who have devoted a lifetime to researching a particular artist. There are also widows, sons and daughters, and individuals not related by blood who nonetheless have inherited the moral rights. In fact, there are so many people that it is nearly a full-time job to manage the logistics and keep track of all the correspondence. It is a treacherous field, as scholarship changes and develops over time and reputations of experts rise and fall. There are other risks to bear in mind when submitting a work to an expert for authentication. Many of the experts are in France, and there is always the risk that the work can be seized and destroyed if deemed to be inauthentic.

Since paintings, drawings, and sculpture are sold according to our terms of guarantee and our decisions have financial ramifications, Sotheby’s has to form its own opinion of the qualifications of the expert who is adjudicating the fate of a work. How much confidence do we have in his or her scholarship and “eye”? Is one side of the ideal balance between the two more developed than the other? Even if legally entitled to issue opinions in France, is it likely that the opinion of a given expert will be accepted in the Anglo-Saxon world? Once a catalogue raisonné has been published, how reliable do we think it is? It is not uncommon for revised editions of catalogues raisonnés that theoretically benefit from the insights of the most recent scholarship to be less satisfactory than the original publication. For example, many of the additions included in the 1994 Gustave Caillebotte catalogue raisonné by Marie Berhaut,[1] first published in 1978, have not found universal acceptance. A committee has now been formed to clarify some of these issues, further complicating the task of the gallery owner or auction house expert who has to decide whether or not to sell a certain work.

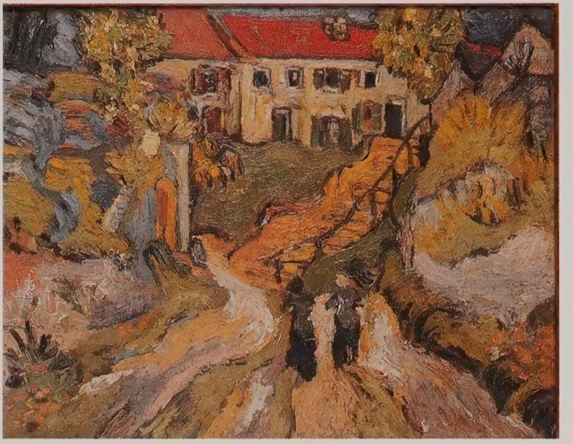

FIGURE 1. *L’escalier à Auvers*, 1890. 19” x 24”. Sold as a Van Gogh at Sotheby’s June 26, 1984. Withdrawn from sale by Sotheby’s six years later, June 26, 1990.

In this brief presentation, I will discuss a few artists and try to show how we reach decisions or indicate what kind of precautions are necessary with even the most thoroughly researched artists. At their best, catalogues raisonnés speak with great authority. Since they represent the result of years of work and extensive research, there is perhaps a natural tendency to take this authority at face value, but that can be a mistake.

VAN GOGH AND CÉZANNE

For the last hundred years, no artist has been more thoroughly researched than Van Gogh. Since 1930 the standard work on Van Gogh has been the catalogue raisonné by J.-B. de la Faille.[2] Subsequent editions in 1939 and 1970, the latter revised by a committee after de la Faille's death, made numerous small changes, but no attempt was made to revise the way in which de la Faille organized his material. In 1977 Jan Hulsker, an independent scholar, published his own catalogue, which relied heavily on de la Faille but attempted to present the development of the *oeuvre* in a more readily accessible chronological manner. On the strength of its inclusion in de la Faille, *L'escalier à Auvers* (Fig. 1) was included in a sale at Sotheby's on June 26, 1984 – in fact it was on the cover of the catalogue – when it sold for 430,000 pounds. Six years later it was reoffered for sale at Sotheby's, on June 26, 1990, but by this time there was a growing feeling that a number of works included in de la Faille, particularly from the artist's Paris and Auvers periods, including this landscape, were not authentic. As a result it was withdrawn from the sale, and the original purchaser was reimbursed. In the most recent edition of Jan Hulsker's *The New Complete Van Gogh* (1996), this work is still included (with the wrong location), although the authenticity of forty-five works is questioned in a rather oblique manner.[3] Stating in the introduction that, "Not all the works reproduced here should be considered authentic," Hulsker added a question mark after the date of the works whose authenticity he doubted.

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[1] Marie Berhaut. *Gustave Caillebotte: Catalogue Raisonné des Peintures et Pastels* (Paris: Wildenstein Institute, 1994).

Even with scholars and publications generally thought to be reliable, then, it may sometimes be necessary to proceed with caution. Another example of this is John Rewald's Cézanne catalogue raisonné that Walter Feilchenfeldt and Jayne Warman completed after his death.[4] The co-authors did not reject any of the works that Rewald had intended to include in his own catalogue, although they had reservations on a number that had belonged to Paul Gachet and Paul Gachet fils, singling out seven of them that should be given further critical examination.[5] Feilchenfeldt concluded this section with the following remarks: "When in doubt, Rewald decided rather to include than reject. He was guided by the philosophy of the German historian Max F. Friedländer, whose famous remark he translated as follows: 'It is indeed an error to collect a forgery, but it is a sin to stamp a genuine piece with the seal of falsehood!'" I think that those are admirable sentiments, but, as we have seen, this generosity of spirit can lead to situations in the marketplace that are difficult to resolve.

MODIGLIANI

If a certain amount of caution or at least a reading of the fine print is to be used in dealing with the catalogues of even the most reputable scholars, how should we proceed when the published literature is highly uneven in quality, and when there are as many works of questionable authority as there are works that are universally accepted? Modigliani is a classic case. He had lived a rather disorderly life, and almost as soon as he died, forgeries began to appear on the market. A first "catalogue présumé" was published by Arthur Pfannsteil in 1929, only ten years after the artist's death, although it proved to be of limited use. Of 290 works listed, only 84 were reproduced. There were plenty of books of a sensational nature published in the intervening years but no serious attempt at a catalogue raisonné until 1958, when Ambrogio Ceroni published his, which he updated in 1970 as *I dipinti di Modigliani.*[6] This included 337 oil paintings, although Ceroni stated that he had omitted at least 80 works that he felt were open to question. In the same year, Joseph

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[2] J.-B. De la Faille. *L'oeuvre de Vincent van Gogh: Catalogue Raisonné*. 4 vols. (Paris and Brussels: G. van Oest, 1930).

[3] Jan Hulsker. *The New Complete Van Gogh: Paintings, Drawings, Sketches* (Amsterdam: J. M. Meulen, 1996).

[4] John Rewald. *The Paintings of Paul Cézanne: A Catalogue Raisonné.* Written in collaboration with Walter Feilchenfeldt and Jayne Warman. 2 vols. (New York: Harry N. Abrams, 1996).

[5] *Ibid.*, p. 15. See also W. Feilchenfeldt, "Doctor Gachet – friend of Cezanne and Van Gogh?", *IFAR Journal*, Vol. 2, no. 3 (Summer 1999). pp. 8-11.

[6] Ambrogio Ceroni. *Amedeo Modigliani, Peintre* (Milan: Milione, 1958); *I dipinti di Modigliani* (Milano: Rizzoli, 1970) .

Lanthemann increased the *oeuvre* to a total of 420 paintings and 633 drawings in his own catalogue raisonné on Modigliani.[7] Without provenance, literature, and mostly without locations, this catalogue might almost be regarded as the "anti-catalogue raisonné." Since then there have been others – one in 1990 by Christian Parisot produced under the auspices of the Archives Légales Amedeo Modigliani, but none the better for that, and one more by Osvaldo Patani.[8] Stepping into this minefield is Marc Restellini, whose own catalogue of Modigliani will be published by the Wildenstein Foundation in the near future.

How to navigate in these very choppy waters? Although Ceroni did not live to complete his investigations, it has been generally accepted that among all the specialists in Modigliani, he was the most thorough and levelheaded. Although he has always had a broad popular appeal – in part, perhaps, because of his bohemian life-style – Modigliani was a serious artist, a sensitive colorist, and a brilliant draftsman. It is much more than a question of long necks, almond-shaped eyes, and soulful expressions, as Ceroni recognized. Consequently there are none of the juxtapositions of genuine works and crude pastiches that are to be found in some of the other publications. In theory the new catalogue being prepared by Marc Restellini will supersede all the others, and one hopes that it will. Public acceptance of works that are added to the *oeuvre* will in large part depend on two issues – is the work itself of sufficient quality to be by Modigliani, and is the provenance convincing?

> "Although Ceroni did not live to complete his investigations, it has been generally accepted that among all the specialists in Modigliani, he was the most thorough and levelheaded."

MONDRIAN, ROUSSEAU AND OTHERS

Some of the new catalogues have done outstanding work on the tracing of provenance; the Mondrian catalogue by Robert Herbert and Joop Joostens is a model in this respect. Others, although lavishly produced, do not go as far as they might have. The recently published volumes devoted to Derain, Léger, and Miró would all have benefited from more exhaustive research in this area. This, of course, is the field of scholars. On the other hand, many of the authors of catalogues raisonnés and experts do not have a scholarly background, although they do have access to family archives, gallery records, and so on. All of this information is essential. Naturally, through discussions with colleagues and word of mouth, we have to decide how we are going to work with each expert and how much confidence we have in their opinions. There are also cases where there are no experts or recognized authorities at the moment. With Henri Rousseau, called the Douanier, there is currently a hiatus, as both of the authors who wrote copiously on Rousseau (and who disagreed violently with one another) – Henry Certigny and Dora Vallier – are dead, and there is nobody in an official capacity to consult. In this confusing situation, the safest course is to reject any work that does not live up to the criterion of quality – is it good enough to be by the artist? – and that does not have a convincing paper trail back to the artist.

DIEGO GIACOMETTI

An example of a situation in which the lack of published information and widely accepted expertise had dire consequences is Diego Giacometti, whose furniture began to sell for very high prices from the mid-1980s. Although he received commissions for decorative ensembles during the 1950s, it was only after the death of Alberto in 1966 that Diego really began to be recognized as a master designer and craftsman in his own right. If you wanted a set of chairs or a table or whatever, you would commission it directly from Diego and wait patiently until it was ready. Diego would work on the individual elements in his studio – the legs of tables and chairs, cross bars, decorative elements such as birds, dogs, or frogs – and these would be sent out to various foundries to be cast in bronze. These were then sent back to the studio where Diego and his assistants would assemble the pieces of furniture that had been commissioned. It was very much a cottage industry. Payment was generally in cash, and only infrequently would there be any bills of sale or records of the transactions (not the ideal situation for the art historian or researcher!).

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[7] Joseph Lanthemann, *Modigliani, 1884-1920, catalogue raisonné: sa vie, son oeuvre complet, son art* (Barcelona: Condal, 1970).

[8] Christian Parisot, *Modigliani: catalogue raisonné* (Livorno, 1990-91); Osvaldo Patani, *Amedeo Modigliani: catalogo generale*, 3 vols. (Milano: Leonardo, 1991-94).

The trouble began after Diego's death. Although the family had determined that there should be no posthumous casts, they had no control over the original molds that had been left behind in the studio and in the foundries. Between November 1985 and March 1989, a large number of unauthorized casts were made by a number of people who had been closest to Diego, including assistants and foundry workers who were thoroughly familiar with his working practices. These varied in quality from bronzes cast from the original molds, which were virtually indistinguishable from casts made by Diego himself, to *surmoulages* (casts made from other bronze casts), which were far inferior in quality, and those that were part original and part forgery. As a result of Diego's last major commission – the furnishings for the Musée Picasso – the demand for his furniture was growing just as his own health began to decline. His death seemed only to intensify the desire for his work. During this period and until 1991, when many of those involved with the forgeries were tried and convicted, a large number of fake bronzes were sold. This presented an interesting problem because, theoretically – and at their best, that is to say, when they were cast from the original molds – there would be no difference between a chair or a table made by Diego himself and a posthumous cast made by somebody familiar with his working methods. Certainly, some were much cruder – the outright forgeries with poor patinas and the surmoulages, in which there was a pronounced lack of definition – but because people were not asking the right questions at the time, many works were sold that should not have been.

"Both of the authors who wrote copiously on Rousseau (and who disagreed violently with one another) — Henry Certigny and Dora Vallier — are dead, and there is nobody in an official capacity to consult. In this confusing situation, the safest course is to reject any work that does not live up to the criterion of quality . . ."

What are the right questions? During Diego's lifetime, the market for his work had been essentially unregulated. There had been numerous individual transactions – seldom fully documented – isolated exhibitions, and publications on his work – but not a thorough study. Of course, there were many collectors and dealers, primarily in France, who had dealt with Diego during his lifetime and had developed a strong rapport with his work. Unfortunately, the galleries and auction-house employees who suddenly had to deal with quantities of furniture in the late 1980s had not had the opportunity to inspect in person very much original furniture. If they had, they would have realized that Diego was a master craftsman and that many of his bronzes are notable for the beauty of their patinas. Only in retrospect did it also become apparent that good provenance is of key importance in establishing the authenticity of a work by Diego Giacometti. A vague "Acquired from the artist" is not sufficient unless backed up with names and dates. Since then the situation has greatly improved.

Diego Giacometti was perhaps an extreme case, but the lessons learned the hard way have not been without their usefulness. As I mentioned at the beginning, we deal with everything from Boudin to Henry Moore in the Impressionist and Modern Department, and we have to feel comfortable with what we sell. We have to develop a familiarity not only with the literature on each artist, which may be extensive or virtually non-existent, but also with scholars and experts who are continuing to work in various fields. With each artist and with each expert there are different concerns, and knowledge of this only develops over time. One learns from experience, and sometimes the hard way, but the important thing is to avoid those bad situations by assessing each situation as it arises.

> "Only in retrospect did it also become apparent that good provenance is of key importance in establishing the authenticity of a work by Diego Giacometti."

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DROIT MORAL AND AUTHENTICATION OF WORKS IN FRANCE

The Challenge for Authors of Catalogues Raisonnés Faced with Claims of Sight-Impaired Surviving Spouses and Hostile Heirs

VAN KIRK REEVES*[1]

Authors of catalogues raisonnés are by nature tough-skinned, accustomed to the anger of owners of works that the author does not think are "quite right," the entreaties and more material offerings of dealers seeking justification for a work, and the impatience of auction houses who would like to know now and not tomorrow if a work is "good."

But French law alone gives to artists, their heirs and legatees extensive rights and privileges to challenge the conclusions of the author of a catalogue raisonné.

To establish the rights of an artist, his legatees and heirs, one usually looks to the law of the artist's domicile. In view of the extraordinary number of artists who chose France as their domicile in the 19th and the 20th centuries, French law influences art law everywhere.

It is all to France's honor that it values artistic creation and seeks to protect it. Protection is provided by giving to the work of art almost a legal personality, and the artist, his assignees, legatees and heirs may assert substantial rights.

WHAT ARE THE MORAL RIGHTS?

These moral rights encompass the following:

1) The right to create – A person has the freedom and latitude to express his creativity. While this is a Right of Man, French law gives a broad license to the artist.[2]

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* Van Kirk Reeves is Partner at Porter Reeves Ramier, a Paris-based law firm specializing in art law issues.

[1] Although initially developed for this IFAR conference, certain ideas contained in this article, and some of the text, were further developed by the author in "Establishing Authenticity in French Law," in *The Expert versus the Object: Judging Fakes and False Attributions in the Visual Arts*, Ronald Spencer, ed. (New York: Oxford University Press, 2004), pp. 227-34.

[2] Cf. *United Nations Bulletin* 6, 1 (Jan. 1, 1949), article 27. French law also protects the honor and reputation of an artist against the mistreatment of his work. The right to honor and reputation is sometimes referred to as a moral right, but strictly speaking, its basis is broader.

2) The right of disclosure and completeness – The artist is the sole party who can determine if and when his work has been achieved. Without the artist's approval of a work, it is not the work of the artist.[3]

3) The right to withdraw – Even after the work has been created, the artist has the right to disavow the work. In such a case, the work is no longer authentic.[4]

4) The right of paternity –The artist is entitled to be recognized as the creator of the work.[5]

5) The right of integrity –The artist has the right to establish what the work is. The work cannot be tampered with or adjusted.[6]

We cheer and celebrate these victories protecting the work of the artist from the taste and finances of third parties, including those who may own the work. What could be more logical than that these rights, granted to the artist, should be passed on to the artist's heirs and legatees upon the artist's death? Who could protect the patrimony of the artist better than those closest to him? Who should be the most knowledgeable of his artistic desires and his creations? It all sounds logical, but good logic sometimes defies common sense.

Such laws give the artist the right to assert his rights, even in the absence of ownership, over the body of work, and in a burst of generosity, these rights extend to his legatees and heirs for seventy years from his death.

In the *IFAR Journal* a few years ago, there was an interesting and well-developed discussion between Professor John Merryman and Franklin Feldman as to how far French artists could assert their rights to establish whether a work was authentic.[7]

A major moral right grants an artist or his legatees and heirs the right to be a plaintiff, to challenge the authenticity of a work. This is a particularly important right in French law because when an object is held to be a fake, it can be destroyed.[8]

The expert appointed by the French Court to rule as a Master on the work's authenticity will normally consult the artist, if he is living, or his legatees or heirs if he is not. The opinion will be considered and may well govern. As the holder of the moral rights has the possibility to be heard in court, both the author of a catalogue raisonné, as well as the editor, must be prepared to defend their views from that of a French court and the holder of the moral rights.

Where a catalogue raisonné contains what a French court considers fake attributions, it can order corrections or even destruction of the book. Thus, even if the book is not published in France, the editor must be concerned about copies distributed there.

FRENCH COURTS AND AUTHENTICITY

The protections that French courts provide for the determination of authenticity have certain advantages over the proof of authenticity in American law, but there are certain disadvantages as well.

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[3] Law no. 57-298 of Mar. 11, 1957, art. 19.

[4] Law no. 57-298 of Mar. 11, 1957, art. 32.

[5] Law no. 57-298 of Mar. 11, 1957, art. 6.

[6] A simple case embodying this principle is that of the well-known Bernard Buffet refrigerator painted by the artist as a simple unit. The artist was able to stop the sale of dismantled parts (*Buffet v.Fersig* [1962]). Recueil Dalloz (D. Jur.) 570 (Cour d'Appel Paris, note Desbois, aff'd [1965] Gaz. Pal. II126). A more complex example was the dispute between Dubuffet and the Régie Renault. In this case, Jean Dubuffet was asked to design a garden for one of the facilities of the car manufacturer, Renault. The artist created the model, which was approved by the Régie Renault, and construction of the garden commenced, but was subsequently abandoned. The artist sued, claiming his moral rights were violated; the Appeals Court held that the artist had no rights to be asserted on the garden that was to be created from his model, but the Highest Court ruled that the artist's moral rights existed in the garden that had been agreed to be built from the model. On re-hearing, the Court ruled that Renault was required to fulfill its obligations to complete the garden in accordance with the form of the model. After winning the case, the artist did not seek enforcement of the judgment. TGI Paris, 23 March 1977, *RIDA* July 1977, note Desbois; CA, Paris, 2 June 1978, *Dall.* 1979 J. 14, note Colombet; Gaz. Pal. 1978 III, note Franck; Cass. Civ. 8 January 1980, JCP 1980-19336, note Lindon, *Dall.* 1980-83, note Edelman, *RIDA*April 1980, p. 154, observations Francon; Versailles, 8 July 1981, *Dall.* 1982; IR 45, observations Colombet; Cass. Civ. 16 March 1983, *RIDA* July 1983, p. 80.

[7] See Letters to the Editor, *IFAR Journal*, Vol. 1, no. 2, Summer 1998, pp. 4-5. See also "Panel takes on 'Challenges' of the Catalogue Raisonné," *IFAR Journal*, Vol. 1, no. 1, Spring 1998, pp. 9-12.

[8] French *Code de la Propriété Littéraire et Artistique*, Article L. 335-2.

Authenticity is not established in a court by a beauty contest between the experts for the plaintiff and the experts for the defendant. A French court will name, usually from a list of experts that the Cour d'Appel de Paris and the Cour de Cassation maintains, an expert who is knowledgeable about the artist. The court-appointed expert in accordance with his mandate then acts as a Master, and it is he who rules on the factual issue of authenticity.

He reviews the work itself and consults persons as he chooses in evaluating the issue. Both plaintiff and defendant can provide written material to the expert and can require the expert to hold hearings where witnesses can present their opinions. An American attorney accustomed to the cut and thrust of questioning witnesses in an American court would be surprised by the informality and good manners with which such hearings are conducted in France.

> **"What could be more logical than that these rights, granted to the artist, should be passed on to the artist's heirs and legatees upon the artist's death? . . . But good logic sometimes defies common sense."**

The disadvantage of the French court-appointed expert is that he normally is also a dealer in art of the period of his expertise, and there have been on occasion experts whose objectivity has been questioned. Still, many would agree that this is a preferable system to one in which a judge can turn himself into an art connoisseur simply by wrapping himself in his black robe.[9]

In granting such rights to heirs and legatees, French law has not considered the failing eyesight of surviving spouses or the jealousy of neglected children and the disputes that can occur where the artist has had children from a number of spouses.

Once the issue of authenticity is determined under French law in a hearing where the rights of the artist, his heirs and legatees have been given special consideration, the author of the catalogue raisonné must, if the finding on authenticity is unfavorable to him, face a claim for damages in view of his misrepresentation of the nature of the object.

French law does not require an expert to be right. The standard of an expert is that he must have proceeded prudently and carefully. A person who holds himself out as an expert is liable to a duty of care, and if the court determines that his view has been wrong, it will grant damages to an aggrieved party unless the expert is able to show due care.[10]

Many authors of catalogues raisonnés, when called upon to authenticate a work, do not give the reasons why they will not include the work in their catalogue raisonné. The claimant may more easily be able to challenge the diligence and good faith of the author of the catalogue raisonné where the author has disclosed the working tools that he used to determine that the work was not authentic.

Nonetheless, when the author is sued, the author should be prepared to show his work methods and show his notes, so that he can resist a claim that he was negligent or that he did not exercise due care. A lawsuit can therefore require the author to divulge his work methods so as to protect himself from the claim that he failed in his duty of due care. To protect themselves, some authors of catalogues raisonnés have standard form agreements that include an agreement by the owner not to sue, no matter

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[9] In an American case involving the authenticity of a mobile by Alexander Calder, the judge ruled against the opinion of Klaus Perls, the artist's long-time dealer, a man whose view on the works of Calder was relied upon by the marketplace. *Greenberg Gallery Inc. v. Bauman*, 817 T. Supp. 167 (D.D.C. 1993) aff'd (1994 U.S. App. LEXIS 27175).

[10] *SCP Perrin-Royere-La Jeunesse v. Daniel Guillard*, Cour de Cassation, Civ. 1, Nov. 21, 1995. Here the auction house (*commissaire-priseur*) and the expert were held liable, not because the work was a fake, but because they had failed in their duty of diligence to ascertain whether the work was by the artist or not. Their liability was in tort for a failure of due diligence.

"Where a catalogue raisonné contains what a French court considers fake attributions, it can order corrections or even destruction of the book."

what decision the author makes as to the object, but French courts have not yet had the opportunity to consider whether such an agreement not to sue should be permitted to bar a claimant, particularly if the allegation is that the author acted maliciously.

Recently, Marc Restellini, author of an as-yet unpublished catalogue raisonné on Modigliani, has been challenged for intervening when he was not requested by the owner to give an opinion, where he, on his own initiative, wrote an auction house to say that a painting being offered for sale was not by the hand of the artist.[11] Consequently, the work was withdrawn from sale. This suit, which has been launched against the publisher of the catalogue raisonné as well as the author, was first brought in New York, where the court dismissed the case for lack of jurisdiction.[12] A suit was then instituted in France. If as a result of this suit it is found that the work in question is in fact "authentic," the court would have to consider the responsibility of the publisher, who was preparing to publish the catalogue raisonné but had not yet done so. Meanwhile, the publication of the catalogue raisonné of Modigliani drawings has been abandoned and the catalogue raisonné on the paintings has at least been postponed.

Such problems are endemic to authors, generally. But the rights of heirs and legatees in France raise particular subjective considerations. The motives of embittered spouses and disadvantaged heirs, particularly children of an earlier marriage, can be far from objective. We know about anger and vengeance among family members, and we know better than to ask King Oedipus, "How's the family?"

To give such parties rights to intervene in disputes and in the sales process creates a risk in the marketplace and a risk for scholars and dealers that can be costly to their enterprises and disastrous for the study of works of art.

Our friends at the auction houses are accustomed to a feeling of dread when they are approached by family members of the artist, holders of the moral rights, who have neither sympathy with the artist's work nor knowledge of his *œuvre.*

In the best of cases, the publisher or author may simply note that a work is disputed by the holder of the moral rights. But as a French court can order the destruction of a fake, and because the holder of the moral rights can bring an editor, author or owner into court, where the cost will be high and the proceedings can last a number of years, the scholarship and freedom of critical opinion is prejudiced.

The difficulties of proving prejudice or bad faith as a defense in order to protect the author and his publisher, especially in the highly inflammable situation of family relations, is such that the author is particularly vulnerable.

The moral rights given in France, which few would challenge where they are granted to the artist while alive, can be utterly prejudicial to the proper development of scholarly research on the artist and his *œuvre* and the circulation of his work, although in a perfect world these very persons are often best suited to be the keepers of the flame.

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[11] See "Querelles autour d'un Modigliani," *le Figaro*, July 20-21, 2002. The auction in question was Christie's London, Impressionist and Modern Paintings, Watercolors and Sculptures (Part 1), June 23, 1997.

[12] *Shaltiel v. Wildenstein*, 288 A.D. 2d 136; 733 N. Y. S. 2d 400; 2001 N. Y. App. Div. LEXIS 11459 (2001).

WHO JUDGES THE EXPERTS?

Q&A

GRACE H. GLUECK, MODERATOR (GG)
PETER SUTTON (PS)
JOHN L. TANCOCK (JT)
VAN KIRK REEVES (VR)

Q **GRACE GLUECK:** Mr. Reeves, is France the most stringent country with regard to artists' rights? Does any other country have anything remotely resembling its legal apparatus?

A **VR**: Other continental European countries have elements of it. France is the most assertive of moral rights and the rights of artists and, therefore, legatees and heirs. This is why so much of the litigation ends up in France . . . I know of no serious study by any group in France to change their rights at this time.

Q **GG:** Mr. Tancock, what do you do when a connoisseur loses "his eye," so to speak, or becomes a little frail about making judgments?

A **JT:** I'm afraid that is not uncommon. Obviously, we have to handle the situation with as much discretion as we can, and basically, I think, rely on our own opinion. If a recognized expert gives a positive opinion with which we profoundly disagree, I think Sotheby's would make a decision not to sell the work.

Q In France, the forgers themselves say they avoid certain artists because of the existence of the families. Is this so?

A **VR:** This is perfectly true . . . . A number of artists' families have devoted their lives to scholarship and to reviewing the artists' works. Their archives and catalogues are the most valuable source for the proper study of the artists, so that in a good family situation, I think the French system works marvelously.

Q **GG:** Mr. Sutton, is the Rembrandt Research Project committee still taken as seriously as it was?

A **PS:** Yes, I think it is. Ernst van de Wetering is the one member of the original group who is still very much a part of the team and is still producing important scholarship. There is a new group and a new approach: they are no longer treating the artist chronologically, but thematically. Their next

> "What the Rembrandt group has shown us is that having a committee does not necessarily create unanimity or anonymity of opinion, and that having more eyes does not necessarily lead to a clearer understanding of works."

volume will be dedicated to self-portraits,[1] and the following volume will consider the smaller history paintings. It is quite clearly a case of changing course in midstream, but their expertise, their understanding, and the information they have gathered is still terribly important to establishing authenticity.

Q **GG:** In other words, connoisseurship is the process, and it can go on forever.

A **PS:** It certainly is organic.

Q It has occasionally been proposed that a committee be formed to vet the vetters, to pass judgment on various catalogue raisonné projects. How does the panel feel about that proposal, and who might be on such a committee?

A **PS:** What the Rembrandt group has shown us is that having a committee does not necessarily create unanimity or anonymity of opinion, and that having more eyes does not necessarily lead to a clearer understanding of works. Personally, I think that people undertaking catalogues raisonnés should try to take more on by themselves and not do it by committee.

Q Mr. Reeves, has there ever been a case where a work of art was destroyed and then, ten years later, new information came up and it was discovered that the work was actually by the person to whom it was initially attributed?

A **VR:** I don't know of such a case, but I do know of cases where the court, in ruling that the work is a fake, has also said that they are not so sure that it's a fake, so they have not ordered its destruction.

Q Many people are afraid to send works to France for review for fear that the works will be confiscated and destroyed. Is it possible to assuage those fears by putting those works in a bonded area in the airport, for example, so that they are not technically reviewed under French law?

A **VR:** It is possible to do that, but some of the reviewers would not agree to see the work under those circumstances. A number of the families who wish to conserve the artistic integrity of the artist want to be able to remove works that are not authentic from the marketplace.

Q If the court decides to destroy a work in limbo, is there a form of compensation for the person who owns the work?

A **VR:** No, because he has a fake . . . . He will have the opportunity to go to court to protest; otherwise, as a fake, it will be destroyed. That is French law.

Q Even a fake has an author, so what if we submitted a Monet and it turns out to be a Manet?

A **VR:** A fake is different from a misattributed work. A fake is a painting created and presented as a work by another artist. It is considered a theft of the artist's integrity. If you go to any museum in France, you will find – as has always been the custom – the copying of works of masters as part of the way artists traditionally learn their trade. There is nothing wrong with copies. Having a copy and claiming it to be the original work, that is the "wrong" that constitutes a fake, and as a fake it should be destroyed – as an act denying the artist his rights and destroying his integrity.

"Many people are afraid to send works to France for review for fear that the works will be confiscated and destroyed. Is it possible to assuage those fears by putting those works in a bonded area in the airport . . . ?"

Q John Pope-Hennessy once said that forgeries of Italian art are part of the art history of Italian art and so it just seems to me that it's really morally wrong to destroy fakes.

A **VR:** The feeling in French law is that it is more important to preserve the integrity of the artist's *oeuvre*.

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[1] Editor's Note: The volume on self-portraits has now been published: Josua Bruyn, et al., *A Corpus of Rembrandt Paintings*, vol. IV (The Hague and Boston: M. Nijhoff, 2005).

GETTING PUBLISHED—AT WHAT COST?

NANCY MOWLL MATHEWS, MODERATOR
ELAINE STAINTON
PAUL ANBINDER
THEODORE H. FEDER

INTRODUCTION

NANCY MOWLL MATHEWS

The following panel addresses issues of authenticity in their most black-and-white manifestation: the published version. The scholar's years of research and consideration of the evidence finally go out to the public in the form of pictures and text. The published document, whether in digital or physical form, has a power that few other books possess and bears an awesome responsibility not only for the author but for the publisher, as well.

Everyone wants the book to reflect well upon himself. The author, of course, wants his or her research to be flawlessly presented. The scholarly reader wants accurate information upon which to base convincing interpretations. The dealer wants the book to be reliable, mainly in terms of authentications. And the collector –whether owner or potential buyer – wants his or her work to be there. All these art world desires meet in the hands of the publisher, who knows that this precious document will represent an enormous amount of work that will not even remotely be paid for by sales. It is the publisher's point of view that we will examine in this panel.

We will hear from two publishers, Paul Anbinder, Founding Publisher and Editor of Hudson Hills Press, and Elaine Stainton, Senior Editor at Harry N. Abrams. Both of them have supervised the publication of catalogues raisonnés and will provide us – in a joint discussion – with their unique perspectives. They will be followed by Theodore Feder, President of the Artists Rights Society, an organization that controls the copyrights and publication permissions for a large number of artists.

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THE PUBLISHERS' VIEWPOINT

ELAINE STAINTON* AND PAUL ANBINDER**

ELAINE STAINTON (ES): Because Mr. Anbinder and I are both in publishing and were afraid we would be repetitive, we have decided to do a sort of Huntley/Brinkley routine. I will talk from the point of view of Harry N. Abrams publishing; he will talk from the point of view of Hudson Hills Press; and, then, I will yield the floor to him regarding issues of marketing and publicity.

THE COMMERCIAL RISK

There is an inherent dilemma in publishing a catalogue raisonné or, indeed, any large scholarly book. Both the scholarship and the publishing process are labor intensive, costly enterprises. As scholars, you spend years working and researching and gathering photographs with your own money. You know better than anyone that the work you put into the project ultimately does not pay. On the other hand, we are for-profit publishers; if we do not stay in the black, we go under. So there is an inherent dilemma in publishing scholarship. One solution, of course, is the university press, which is subsidized by the university; it also has certain tax advantages.

> "Given the economics, why do we publish these books at all? I might as well ask, 'Why are you a scholar?'"

I work for a commercial publisher, and Mr. Anbinder is in theory a commercial publisher. We both know, however, that what we do is highly uncommercial. If you are dedicated to art and art publishing, that is simply part of your compact with history. We have to think of the publication of a beautiful, well-produced, seriously-researched scholarly book as a production, something like grand opera at The Metropolitan Opera. Every operagoer knows that the tickets don't pay for the production. There are many other sources of support because we all think it's valuable. It is part of our culture and our history.

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* Elaine Stainton, Ph.D., was Senior Editor and Director of the Museum and Art Group, Harry N. Abrams, Inc. until 2006. She is now Vice President and Executive Director, Painting Department, Doyle New York.

** Paul Anbinder is the Former and Founding Editor and Publisher, Hudson Hills Press.

The same is true of a wonderful art book. Good scholarship, the photos that convey the look of the images, the way they are produced and put together – this is a valuable thing, and we are all dedicated to it.

Given the economics, why do we publish these books at all? I might as well ask, "Why are you a scholar?" We are all in this together, with the same objective. On the other hand, publishers do have the practical problem of simply staying afloat. The costs are staggering – editing, binding, design, paper – more expensive all the time. And photographs. Color separation costs are enormous. Although they are beginning to come down, historically, they have been very high. Many people think that if you take a photograph, it will look the same way on the page. Anyone who has been involved in publishing color images, however, knows that photographs have to be color corrected. At Abrams we color correct three times. It is probably the same at Hudson Hills. Marketing, distribution, and warehousing also have costs. So why do we do it? We do it because, costly as it is, it is valuable and worth doing.

SELECTION PROCESS

Which artists do we publish? Obviously, the artist has to be important enough to deserve a catalogue raisonné. You cannot ask me to publish a catalogue raisonné of your grandmother's county fair art, no matter what the subsidy is. We have standards. We look for the quality of scholarship and the quality of the artist. It has to be a reasonably important artist, although it can be an unknown one – an artist who is perhaps known to specialists, but not to a wide public. But it has to be someone that we seriously think merits this attention. We also want a scholar who is worthy of the project and can carry out the research and the synthesis that we eventually want to publish.

PAUL ANBINDER (PA): Being an alumnus of Abrams publishing myself, I have had some of the same experience as Elaine Stainton. But Hudson Hills is a small, independent firm, and our answers to some of these questions are somewhat different. As to how we choose which catalogues raisonnés to publish, at the end of the day, it comes down to what we get offered. There are lots of wonderful catalogues raisonnés that do not get offered to us; we did not publish them simply because we never had the opportunity. We have worked with living artists, moreso than Abrams, as well as some no longer living. We have done catalogues raisonnés on paintings – we just did the Fairfield Porter catalogue – on sculpture, on drawings, and, mostly, on prints. We have done about a dozen catalogues on the graphic *oeuvre* of twentieth-century artists.

FINANCING CATALOGUES

I have the great luxury of being able to publish what interests me, but financing is also a very important consideration. Some of our catalogues raisonnés have paid their own way, they have even been profitable, although that is certainly more the exception than the rule. Certain projects are lucrative and help support other projects that do not pay their own way. Also, certain projects come with subventions or financial help. Many foundations provide grants for catalogues raisonnés. They will not give money to us because we are not not-for-profit. However, many of the scholars and entities that we work with are able to get foundation grants that can go into the catalogue raisonné publishing pool. Some of our catalogues raisonnés have been helped by the artist himself, who actually printed a new edition of graphic work that could be sold, with the proceeds put toward the publication of the catalogue raisonné. Some catalogues raisonnés have been published in conjunction with retrospective exhibitions, providing for guaranteed sales, because the catalogue raisonné also served as an exhibition catalogue.

Thus, catalogues raisonnés happen in many different ways. Underlying them, however, as Elaine Stainton said, are the criteria of whether we feel the work is worthy of publication in terms of the artist's *oeuvre*, and whether we feel that the scholarship is satisfactory.

ES: Returning to the issue of costs, many scholars, people who are otherwise immensely sophisticated, do not understand the economics of publishing. So let me just lay out a few basic facts. Publishers do not sell directly to the public. We sell to booksellers, and they sell to you. So, in the normal run of commerce – and this is true with most kinds of objects that are sold – if you spend X to produce something, you have to sell it for roughly two X to stay in business. The person who has acquired it for two X has to then multiply that by two, and, ultimately, it is sold retail for four X. That is true whether we are discussing root beer, widgets, or (I hate to make this analogy) art books. So if, for example, it costs Abrams ten dollars to produce a book, we will sell it to the bookseller for roughly twenty dollars, who will sell it to the retail client for roughly forty dollars. Those are the general economics. With a catalogue raisonné, those figures go out the window because the audience is so small. Scholars often say, "I know this is going to be a very popular book. Everybody I know wants to buy this book." Well, you know two hundred art historians, or two hundred intensely interested people. To us, a sale of two hundred books is a disaster. Because of our production costs, because of the way the book business runs, we have to think in terms of much greater sales. With a catalogue raisonné that is not likely to happen. The audience is rather small. It is my favorite audience. I would rather pitch to the people in this room than to the mass market, but size is a consideration.

One problem in publishing a catalogue raisonné is that everybody wants it for free. The author and all the scholars who have helped him want a free copy. The museums that gave permission to print a picture in their collection want the book for free. But these would be the normal sales market. Some museums actually insist on receiving a free copy in exchange for allowing you to reproduce their work. This happened with our Cézanne catalogue raisonné, which is a four-hundred-dollar book. Everybody wants a free copy. To a certain degree, you have to cooperate. Are you going to produce the book, or are you not? But the normal economics of the book business are often distorted greatly by the fact that it is a catalogue raisonné, and that it is important, and, frankly, that most scholars do not have much money to spend. Four hundred dollars is a lot of money to spend for a book. We have a problem working out the cost: the audience is small, the costs are great. Mr. Anbinder is absolutely right. We depend on grants of various kinds, which we cannot ask for and which we cannot accept for tax reasons. Unfortunately, part of what this means is that the job that we would normally do as the publisher is partly displaced on you, the scholar. I regret it. I would rather it not be so, but it has become more and more true.

"One problem in publishing a catalogue raisonné is that everybody wants it for free. The author and all the scholars who have helped him want a free copy."

One of the issues (and it will be very interesting to hear Mr. Feder later) is photography costs. Photos are simply more expensive. The expense has tended to be displaced onto the scholar. You end up being responsible for gathering the photos and for clearing the rights. In an earlier era, when the world worked a little differently, the publisher assumed those costs.

PHOTOGRAPHS

PA: Our catalogue raisonné authors are responsible for delivering a package neatly tied with a ribbon, including the manuscript, all the photographic material, and all the permissions. But it is in connection with gathering this material that you can, theoretically, get grants.

Regarding color correction – the term itself assumes that we are given a good transparency to reproduce. But with a catalogue raisonné, where a scholar has been gathering material for decades and somebody, perhaps, took a painting out to the side of the barn and sent the photo to the scholar, the material we receive for the publication is sometimes a mixed bag, and that is putting it kindly. Therefore, even three stages of color correction do not accurately reproduce the painting. Moreover, you are often dealing with dupes or even dupes of dupes, and you begin losing track of which way the image reads, whether you've got left or right.

DIGITIZATION

ES: Another issue is the digitization of images. Thus far, Abrams Publishing has not been happy with it. When you digitize an image, the color intensity and the pixels per inch – the electronic encoding of that image – are calibrated in a particular way. If your printing machinery is calibrated in the same way, you can come up with a beautiful image. That is why, for example, a Christie's catalogue can look so good, because, in fact, Christie's digitizes its own images and does its own printing. Everything is coordinated. However, we get digitized images from a variety of sources and send them to a particular printer. If you send digitized images that are encoded electronically in a variety of ways even to distinguished printers like Toppan or Dai Nippon in Japan or Mondadori in Italy, their machinery will read each one a bit differently. The result is an odd disparity in the reproduction quality. The time is coming when everything will be regularized, when there will be a standard, and all printers, digitization machines, and scanning devices will be reconciled. But that day is not here yet, so for scholars it is far better at this point in time to work from standard transparencies.

PA: There is another wrinkle on that topic. Our printers have told us we cannot correct a digitized image. The pixels delivered on the initial disk are all there is to work with, unlike a photographic image that has been scanned, and which can be altered. If you start out with a digitized image, that is it – you really cannot do anything. It may interest some of you to know that for the foreseeable future, we are publishing only in print. We do not have any plans to publish our catalogues raisonnés in digital form. I know that some museums are putting their catalogues and catalogues raisonnés into digital form available on the Web, but Hudson Hills does not do so.

ES: Abrams has made a few attempts to publish electronically on our Website, but we do not know how to make it pay for itself, let alone make a profit. Moreover, not everybody has a computer; certainly at this time, you lose part of your audience if you do not produce a printed book. People keep praising digitized images, but compared with those printed well in a good book, they are not wonderful. So, until all the kinks are worked out, we are not doing it. If you would like a digitized catalogue, you probably do not go to either Abrams or Hudson Hills.

PA: Another aspect of putting digitized images on the Web is that they can be pirated and re-used in a competing form by everyone else, certainly a concern.

ARRANGEMENTS WITH AUTHORS

ES: If you are a scholar working on a catalogue raisonné, we expect certain things of you:

- We want the manuscript in a clear and coherent form.
- We need a hard copy, and also an electronic version on a disc. Our printing is typeset, and a lot is done electronically (which I regret, because there are fine scholars still not at home with computers).
- We prefer not to receive text by e-mail, as things get lost; italics and footnotes often vanish, for example.
- The gathering of pictures and the clearing of rights must be done by the authors, or at least be subsidized somehow. Abrams no longer has a photo department to do that, although, alternatively, we can contract out those tasks. However, out-sourcing is expensive, too, and that expense

has to be borne by the scholar or his funders.

- We have a standard contract with an indemnity clause. Abrams (and this is true throughout the publishing field in general) will not accept any responsibility for lying or for libelous statements made in the book. Our contract will insist that the author assume that liability.
- Generally we pay an advance, which is pitifully small compared to the amount of work the author put into it, I know. There is usually an advance and also a royalty based on sales.

Once we make a deal, we throw ourselves into it heart and soul. We are dedicated publishers; we love art and art history, and when we are finally working together, we (or Mr. Anbinder, or any other good art press) will work with our authors all the way.

MARKETING AND PUBLICITY

PA: I will end the discussion with marketing and publicity. Publicity is perhaps the most frustrating part of what we do. It is near impossible to get reviewed in the *New York Times* or most daily papers. Many big city papers do a Christmas roundup, so once a year you have an opportunity to have a paragraph about a book in a one-page article that surveys a couple dozen different books. The *New York Times* Book Review literally has a policy that it will not review catalogues raisonnés. They will occasionally make an exception, but that is their policy – terrifically frustrating. We continue to hit our heads against the wall. We send out review copies, we send out press releases, we do whatever follow-up we can, but getting a catalogue raisonné reviewed is not easy.

On the other side are scholarly publications. You can eventually get reviewed in the journals, but, frustratingly, often only after the book is no longer in print – a lot of these journals are very, very slow. We annually send letters to various journals saying "You promised a review. What's happening?" They pass the blame on to the writer they assigned, who is busy with his or her own projects. So it is very frustrating.

Regarding sales, we do everything we can to sell these books. Working with the author, we will create a mailing list for an individual catalogue raisonné. If there is a dealer, we work with him. We have our own proprietary list developed over the years. We have a few trade secrets about how we sell our books that I will not give away, but we try to leave no stone unturned. But it is a very imperfect system. The general bookstore is not the easiest place to sell a catalogue raisonné, so a lot of our sales are to institutions. Like Abrams, we have a library approval plan. Many good institutions receive virtually everything we publish, and that is an important base for us. Our books are sold through library jobbers and wholesalers to institutions. We exhibit our books at the College Art Association's annual meeting, at the Museum Store Association, and at the Art Libraries Society's annual meeting. We do whatever we can, but it is a very imperfect system.

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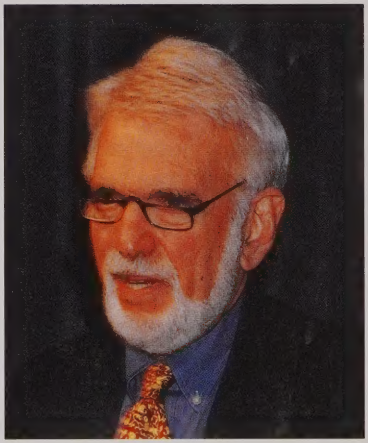
REQUEST FOR BOOKS

Before discarding art reference books—particularly catalogues raisonnés—please contact IFAR to see whether we might be able to use them for our library.

THE ROLE OF THE ARTISTS RIGHTS SOCIETY (ARS)

THEODORE H. FEDER*



When IFAR asked me to join this panel, I said that while I thought I had something to offer in the domain of general publishing, the experience of my organization with regard to catalogues raisonnés is rather limited.

Catalogues raisonnés are of such great importance to artists or their estates, and require such great amounts of time, expense, and effort, that Artists Rights Society is neither called upon nor voluntarily interposes itself into this process. The artist or estate has usually made its own painstaking arrangements with little hope of direct financial gain, and it behooves Artists Rights Society to refrain from participating. The one exception I can think of is when an entity decides to do a catalogue raisonné without the authorization – indeed in defiance – of the artist or estate. In such a rare instance, we might be asked to intervene to stop the project if possible, or to work out an arrangement satisfactory to both sides.

The experience of Artists Rights Society with regard to all other kinds of publishing, however, is quite extensive, and IFAR has asked me to address that.

First, allow me to briefly describe Artists Rights Society, or ARS, its acronym. ARS was created in 1987 at the invitation of the two French artists rights societies then in existence, ADAGP and SPADEM. SPADEM has subsequently ceased operations, and most of its members have joined the repertory of ADAGP. ARS exclusively represents all the artist members of ADAGP in the U.S., as well as the repertories of the rights societies of Germany, Spain, Great Britain, Italy, the Netherlands and those of approximately twenty-five other nations. In turn, these foreign sister societies represent our U.S. repertory in their respective territories.

Our European members include, among others, Henri Matisse, Pablo Picasso, René Magritte, Constantin Brancusi, Georges Braque, Marc Chagall, Marcel Duchamp, Max Ernst, Wassily Kandinsky, Fernand Léger, Joan Miró, and more than 20,000 other, somewhat lesser known names.

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* Theodore H. Feder, Ph.D., is Founder and President of the Artists Rights Society in New York. In 2005, he became a member of the Board of Directors of IFAR.

ARS counts among its U.S. artist members Milton Avery, Alexander Calder, Willem de Kooning, Sam Francis, Arshile Gorky, Sol LeWitt, Man Ray, Georgia O'Keeffe, Bruce Nauman, Louise Nevelson, Jackson Pollock, Mark Rothko, Richard Serra, Frank Stella, Andy Warhol, and others.

Most of what ARS does is governed by copyright law. Historically, as some of you may know, U.S. copyright law has been unduly complex and cumbersome, and has functioned all too frequently to deprive creators of their rights. A longstanding U.S. policy, recently overturned, held that unless the artist fulfilled the formalities of copyright notice and copyright registration for renewal, his or her work fell into the public domain and could be exploited by others at will. Very few American artists took the time to comply with these formalities and to pay the necessary fees. Most did not even know of their existence. Numerous museums and some publishing houses used to maintain that these formal requirements applied to non-U.S. artists, as well – as if Picasso or Chagall working in France in the 1930's had the time or inclination to register their very many works with the U.S. Copyright Office.

Such formal requirements are in absolute contrast to the laws of western European States and to the Berne Convention for the Protection of Literary and Artistic Work. These hold that a work is automatically protected at the instant of its creation and requires no formalities. Fortunately, there have been recent healthy changes in U.S. copyright law that followed our joining the Berne Convention in 1989, by the way, 103 years after that convention was promulgated and approved by most western nations. Further improvements occurred through the copyright restoration provisions of the 1994 GATT Uruguay Round Agreement Act and the extension of the current U.S copyright term in October 1998, which brought it in line with that of the European Union.

It is, of course, the position of ARS that the interests of artists, museums and authors ought to be complementary. Artists or their heirs do not wish to impede authors or museums from achieving their scholarly objectives. Museums, for their part, do not gain from ignoring the reasonable and often modest requirements of creators and authors. All can only benefit from harmonious and productive relationships with one another, and ARS strives to contribute to this.

The majority of authorizations accorded by ARS are for traditional publishing and other non-digital applications, although electronic licensing is becoming more and more common. These include permissions for the reproduction of our members' work in books, reviews, magazines, television, film, publicity, museum merchandise and products in general. Depending on the frequency of demand for the works of an artist or estate, ARS maintains daily, weekly, or monthly contact with the artists or the artists' heirs, be the latter family members, as in the case of the Picasso, Matisse, Calder and Miró families, or other entities such as The Andy Warhol Foundation for the Visual Arts, The Willem de Kooning Revocable Trust, The Georgia O'Keeffe Foundation, The Pollock-Krasner Foundation, etc.

As to how we function on a day-to-day basis: ARS employs its own discretion solely for images on the inside of non-monographic publications, that is, neither on the front nor back cover, and consults with the artist or estate for all other authorizations. ARS' task is to collect as much information as possible about a licensee's request, to propose appropriate fees, and to submit this information and our recommendation to the artist or estate. It is then up to the latter to decide whether to accept or reject an offer, or to accept conditionally.

I estimate that our members reject about 50% of all commercial requests made to them. Some estates are particularly demanding, and will not accept a commercial offer if it is inconsistent with what they believe the artist would have accepted in his or her lifetime. Nothing is more important to these estates than to maintain the unsullied image of the artist. Many a request for mugs, scarves, plates, magnets, etc., are thus rejected. By contrast, there are a few estates which are comparatively open to a wide range of commercial offers.

ARS also performs a monitoring function on behalf of its members, and, not infrequently, finds unauthorized reproductions in the marketplace, in books, and on the Internet. Sometimes the violations are done out of purported ignorance, and the violators are keen to make amends. Others are not, and we have to resort to the legal remedies available to us, either here or in Europe, where the illicit products are frequently distributed, and where the copyright law is even more sympathetic to creators, and the help of law enforcement agencies is readily available.

There are a number of factors that determine ARS fees for a publication; these variables reflect standard publishing criteria. The most important of these are the following: The number of books that will be published. Will the territory of distribution be limited to the U.S., to North America, or to world English language rights? Are foreign language editions contemplated? Are TV or electronic rights envisioned?

It is safe to say that the more rights sought, the higher the fees are likely to be. There are factors, however, that trump most of these considerations. If a work is truly scholarly, is published by a truly small or university press, in small numbers, in a non-deluxe edition, ARS will often reduce its fees to a very low level, or, where appropriate, waive them entirely. An artist or an estate may also have its own reason for instructing ARS to waive fees. Even when the fees are waived, however, we still require mention of the artist's copyright in the publication.

With regard to cost, we often caution authors and editors to purchase only those rights they are sure to need, and to postpone the purchase of foreign and subsidiary rights until such additional rights deals are sure to take place. This reduces the authors' and publishers' out-of-pocket up-front costs until such time as the subsidiary rights sale has been made, and more income is available for rights.

In our view, it is regrettable that many publishing houses increasingly shift the cost of photo rights onto the shoulders of authors. Although this is perhaps understandable in the case of very small houses and university presses, we see the practice employed selectively by some of the large publishers, as well. These fees should be viewed as an intrinsic cost of the publishing process, much as printing and binding fees are. The publisher knows that it cannot get the printer to waive his fees and does not put pressure on the company's production team to pay these out of their own pockets. Needing to see his or her work in print, the scholar is viewed as the most vulnerable link in the chain, and the one most likely to respond to pressure, save for the few who have the clout or leverage to resist.

"In our view, it is regrettable that many publishing houses increasingly shift the cost of photo rights onto the shoulders of authors."

It may be worth noting that a beneficial consequence of the fee arrangements that I have described is that they provide a form of support for the important work the estates do in maintaining their archives, photo libraries and research facilities. The estate or artist thus performs a service which is labor intensive, which may provide for short or extensive visits by scholars, which often supplies document copies, photos, and other materials, and which employs one or several staff members. Indeed, it is not too much to say that most of these archives would very likely cease to exist if they did not receive some support for their work.

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GETTING PUBLISHED—AT WHAT COST?
Q&A

NANCY MOWLL MATHEWS, MODERATOR (NM)
PAUL ANBINDER (PA)
THEODORE H. FEDER (TF)
ELAINE STAINTON (ES)

Q Why does Artist Rights Society (ARS) only waive its fees for university presses and not for commercial presses?

A **TF:** The answer, I think, is self-evident. The small house is a company that disposes of a small amount of funds. A university press is in the same situation and is often intrinsically involved with the scholarly process. We would love to be able to reduce our fees whenever possible. When a very big project comes to us from a commercial entity, we respond to a request for a volume discount. But there is a clear difference in our minds between a trade publisher, a normal publisher if I may call it that, and a very small one.

Q Who should pay for permission fees? Ted Feder threw down the gauntlet to publishers.

A **PA:** We have already explained that catalogue raisonné projects are very difficult for publishers financially, and if we were to take on the additional burden of gathering and paying rights for the photographs, it would push it over into impossibility. Also, the scholar has the possibility of getting grants to help with those costs, and we do not.

ES: It is a fact that we have simply not been able to publish certain scholarly books that we would like to. The designation "for-profit" is a legal designation. It does not necessarily mean that you are making a great profit. My friends who work at university presses tell me that they are under great pressure to be profit-making for the universities. So, the so-called non-profits are not necessarily *not* bringing in money for a larger entity such as a university. Project by project, when it comes to publishing a scholarly book, and certainly a catalogue raisonné, a commercial publisher is working as a non-profit. It is a pro bono enterprise. It is one that I am delighted to do, one that I enter with a full heart, but the fact is that it truly is non-profit.

TF: In that light (and I appreciate the difficulties a commercial house has bearing those costs), I think the ideal solution is for the costs to be shared between the scholar and the publishing house. Let the scholar do as much as he can in terms of raising funds, and if he can raise sufficient monies to cover the entire costs, fine. But often that cannot happen. There should be some communication between the two sides, and both do their best to bear the costs working cooperatively.

PA: That is, in fact, the way it works.

Q Could you address the proportionate cost of obtaining rights versus the costs for color separation?

A **ES:** Our experience is that rights are more expensive than color correcting. It is very hard to separate out things like paper costs, printing and binding because they apply to the whole project. So they are not broken down page by page. One of the reasons we displace the photo rights costs is that it is something the author can do. The author cannot color correct. That takes a professional. The author cannot purchase the paper, cannot decide about the paper stock, will not know what size paper to order – these are decisions that we have to make because we stand behind the production of the book. In fact, costs for rights have become greater than color correction and separation costs, which are beginning to come down.

Q The two publishers on the panel mentioned that their publisher's agreement places the burden on the author/scholar with respect to defamatory material that may appear in the book. This strikes me as right, but presumably the publishers have insurance for defamation, and I am wondering if the publishers have thought about simply adding the authors as additionally named insured in the case of defamation claims?

A **ES:** We occasionally do that – that is negotiated. Normally, we do not. This issue does not arise, so it is something that's in the contract as a parachute, in case something goes wrong. But if it's a controversial book for which we foresee problems, yes, we generally negotiate some sort of clause in which we add insurance and include the author.

Q Without additional costs to the author?

A **ES:** Normally we do not charge the author. I don't know of a case when Abrams has ever charged the author for that, but I can foresee it happening. If someone wants to publish a truly controversial book that looks as if it is begging for lawsuits, I can envision a circumstance in which we would say, "Okay, we'll insure you, but you have got to pay for the extra premium." It has never happened that I know of, however. We have occasionally included the author if it looked like something might happen, but with an art book, it rarely arises. In the case of an authenticity suit, however, if an author says that such-and-such a painting is not by the artist he's writing about and the irate owner then sues him, that is not something that we think we can be involved in. That is something the author must decide on his own how to handle.

Q But you would be involved as a defendant in that case, since you published the work.

A **ES:** We have been sued for many things, but we have never been sued for an authenticity claim. The claim that the aggravated person has is usually with the scholar.

PA: Hudson Hills is somewhat different. Our standard contract leaves us sharing the legal burden with our authors except in the case of an error made by the author in bad faith.

Q It often takes a scholar many years to wrap up a project. When is an appropriate time for a scholar to enter into a discussion with a publisher?

A **PA:** When the end is in sight. I'm happy to talk with an author two, three, even five years before a project is completed if it's on a fairly definite track. But whether or not that conversation turns into a contract will also depend on how far along that project is.

ES: We prefer things to happen further along in the process, but right now, I'm talking to a scholar who's working on a catalogue raisonné he expects to finish and present to us in about five years. In this case, it is a scholar with a very good eye, and a very good ability to do research, but who needs advice on how to shape the book. It's nice to enter into a discussion early if you have something unusual in mind. If you want a classic catalogue raisonné, you might as well wait until later in the process . . .

NANCY MATHEWS, MODERATOR (NM)
PAUL ANBINDER (PA)
THEODORE H. FEDER (TF)
ELAINE STAINTON (ES)

Q When do you decide to remainder a book, void stock, and forget about warehousing it?

A **PA:** Out of the fifteen to twenty catalogues raisonnés that we have published, I think only one was remaindered, and that was one that was kept in print for five or seven years and simply stopped selling. There is a cost involved in warehousing a thousand books, not only because you have paid for that inventory and your capital is tied up, but because you are paying monthly storage. If you are not meant to be not-for-profit, you simply cannot afford to do that. Probably half a dozen of our catalogues raisonnés have gone happily out-of-print after selling out. We did not feel that there was a sufficient market to print them again . . . In order for us to stay in business, we can't worry that thirty years down the road a new generation of scholars and librarians might want the book. The book will be available even then on the secondary market.

Quite a few of our catalogues raisonnés have been reprinted. Sometimes it's been a straight reprint; other times, a new edition. This is one of the aspects of working with living artists – they keep creating, and so, as Jack Cowart well knows, we did a catalogue raisonné of Roy Lichtenstein's prints in 1994 and sold out the first printing, which was a rather substantial print run. While Roy was still alive, we started working on a second edition. Unhappily, Roy did not survive to see publication of the second edition. We have published a second and a third edition of our Robert Motherwell catalogue raisonné, and a posthumous final edition will be published next year [2002]. We are now dealing with the question of whether we can afford to publish another edition of the Sam Francis catalogue raisonné. After being in print for about eight years, we sold the last copy last season. This would be the final edition, because it would include work that he did after the first edition was published.

ES: Our experience is very much like yours. We would not remainder a catalogue raisonné. Unlike Hudson Hills, Abrams tends to work with artists who are dead . . . We do our best to estimate sales, and we stay in print as long as we can. However, like anyone else, we can misjudge, and we tend to work at the lower end. We print, say, five thousand copies, and we are delighted to sell out, so we'll reprint some more. How many more do we think we can sell? It's a gamble. Normally, we'd order fifteen hundred or two thousand more to see what happens. The people who make these decisions (I'm not one of them) on our sales and marketing staff are generally pretty good at it. When we end up with an overstock, it is generally not that many, and we hang on to it as long as we can. But when it finally goes out of print, alas, you cannot go back into print when you think you're not likely to sell more than a few copies a year. You can't afford it.

Q Do you market and distribute internationally?

A **ES:** Yes. Absolutely. Abrams' books are distributed throughout the world, including Eastern Europe, the Middle East, and the Far East. We have particularly good sales in Japan, Southeast Asia and Poland. We have a very broad reach.

PA: The answer is yes for Hudson Hills. We also depend on reviews internationally, particularly in the field of prints. A lot of the important journals are published in France and England, and so we look to them for reviews of our books. We have a distributor in England and Europe, another in Japan, and another in Australia. Our books are sold virtually worldwide. I mentioned earlier the events at which we exhibit our books. I should have added the Frankfurt Book Fair.

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LEGAL LIABILITY FOR GIVING OPINIONS

THEODORE N. KAPLAN, MODERATOR
STEVEN MARK LEVY
RONALD D. SPENCER
PETER R. STERN
ELLEN HOENER ROSS

INTRODUCTION

THEODORE N. KAPLAN*

Around 1972, when I first went to Sotheby's as counsel, a case arose about a painting that had been catalogued and exhibited for many years as a Ruisdael. The painting had been exhibited as a Ruisdael, was bought and sold perhaps three times in about seventy years as a Ruisdael, and was published in catalogues as a work by Ruisdael. Then a Ph.D. student working on a thesis looked at the work and decided to reattribute it. My question is, how does the market handle this situation? The painting belonged to a museum that was selling it at auction. In light of the new attribution, could the museum sell the painting as a Ruisdael, even though it had been in every major book, every major show, as a Ruisdael? The case was settled out of court, and I do not know what happened to the painting. But it led me to start thinking about this process, and so I am very happy to be participating on this panel today.

Our objective is to provide an overview of liability and negligence. What is the liability of a person doing a catalogue raisonné or appraising a painting or an art object? There are also some very good articles on this subject in the conference resource packet.

Our first speaker, Steven Mark Levy, a Los Angeles attorney and author, will analyze the legal responsibilities of art experts, clients, and third parties and describe what constitutes malpractice by art experts. Following him will be Ronald Spencer, a New York attorney and legal counsel to the Pollock-Krasner Foundation. Mr. Spencer has written extensively on authentication issues and has advised several authentication committees about their authentication procedures and the writing of catalogues raisonnés. Our final speaker will be Peter R. Stern, also a New York attorney. He has numerous clients in the art world, has represented Sotheby's in several authenticity cases, and also chairs Volunteer Lawyers for the Arts in New York. His discussion will center on contract issues.

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*Theodore N. Kaplan, Esq., is a partner at Kaplan Fox & Kilsheimer, LLP. He is a Trustee of the National Academy and a member of the Board of Directors of IFAR.

DEFAMATION, DISPARAGEMENT AND MALPRACTICE

STEVEN MARK LEVY*

My talk will focus on whether anyone should fear a lawsuit from publishing his or her views on the authenticity, quality or value of a work of fine art.

Let me start by asking if anyone at this conference remembers a case in which a group of Texas cattlemen sued Oprah Winfrey for defamation and product disparagement. You may recall that this occurred during the British panic over Mad Cow disease. A guest on Winfrey's show, a vegetarian, said that Mad Cow disease was worse than AIDS, and that U.S. beef was at risk of a serious outbreak. Winfrey told her audience, "It has just stopped me cold from eating another burger."

After the show, the price of cattle took a nosedive. The Texas cattlemen sued Winfrey for millions of dollars in lost revenue. The jury returned a verdict in favor of Winfrey, and the court of appeal affirmed.[1] A jubilant Winfrey was quoted as saying, "Free speech not only lives, it rocks!"

Unfortunately, that victory reportedly cost Winfrey over one million dollars in legal fees, not to mention the time and aggravation of dealing with lawyers, giving depositions, and attending trial. And, fortunately or unfortunately, the law of defamation also lives on, even if it doesn't "rock." It makes people cautious about what they say or publish, and it makes them afraid of lawsuits.

Defamation is a worldwide phenomenon. For example, not long ago ago an Australian court ordered the director of an art gallery to pay monetary damages to a Lithuanian portrait artist. The director had described the artist's entry in the Archibald Prize competition as "yuk." Even in Japan, the least litigious industrial country in the world, defamation

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[1] *Texas Beef Group v. Oprah Winfrey*, 11 F. Supp. 2d 858; 1998 U.S. Dist. LEXIS 3559 (N.D. Tex. 1998; aff'd 2001 F. 3d 680 (5th cir. Tex. 2000).

has become a problem. A court in Tokyo, for example, ordered a magazine publisher to pay six million yen to renowned architect Kisho Kurokawa for publishing an article in April 2000 that said that one of the architect's bridges was not popular with the public.

Nonetheless, let me make one point very clear. The chances of being sued for defamation or disparagement when speaking out in good faith about artwork are very, very, very small – so small, in fact, that the leading case on the subject, *Hahn v. Duveen*, dates back to 1929.[2] This is the famous case where the plaintiff, Mrs. Andrée Hahn, owned a painting that a respected French art expert had authenticated as a genuine Leonardo da Vinci. Just as the plaintiff was about to sell the painting to an American museum for a lot of money, the world-renowned art dealer Sir Joseph Duveen denounced the painting as a fake. Duveen's remarks, published in the newspapers, wrecked the sale. The plaintiff sued Duveen for product disparagement, and the dealer ultimately paid a large sum in settlement. But my point is this: when you have to go back to 1929 for a good example, that says something.

In preparing for today's session, I did an electronic search on the LexisNexis database for more recent cases and news articles where the words "art" and "defamation " are in juxtaposition. The list of hits was not large, and many of them were false. For example, an article came up entitled, "Anti-Defamation League Receives Art Collection"– hardly the sort of article to strike fear in the hearts of art historians. It is true that some defamation and disparagement claims are brought and settled quietly, without publicity, so they do not show up in any database. But even taking such claims into consideration, you are probably more likely to have a son who joins the Taliban than to be sued for good-faith pronouncements concerning the authenticity, value or quality of a work of art.

Defamation includes libel and slander. Do you know the difference? "Libel" occurs when the offending remarks are published in permanent form, such as a book or magazine article; "slander," when the offending remarks are in a more transitory form, such as an oral statement or gesture. In today's electronic age, this distinction is gradually being lost, but what is important is this: defamation, in whatever form, is an invasion of an individual's personal reputation. It is defined as a false and unprivileged communication that tends to harm the reputation of another so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. Disparagement, on the other hand, is an invasion of an individual's interest in property; it entails an intentional falsehood that degrades the quality or authenticity of the plaintiff's property and results in monetary damages.

"You are probably more likely to have a son who joins the Taliban than to be sued for good-faith pronouncements concerning the authenticity, value or quality of a work of art."

There are a number of other causes of action that can also be asserted. Among the more common ones are the following:

- tortious interference with prospective economic advantage
- common law unfair competition
- unfair competition under the Lanham Act
- intentional or negligent infliction of emotional distress
- common law fraud

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[2] *Hahn v. Duveen* 133 Misc. 871; 234 N.Y.S. 185 (Sup. Ct. N.Y. Co. 1929).

DEFAMATION

The best way to understand how the law of defamation works is to look at a specific example, a recent New York case called *Sepenuk v. Marshall.*[3] Let me give you the facts. There are two art dealers. Art dealer number one sells an Italian marble sculpture to art dealer number two. A collector comes along who is interested in purchasing the sculpture from dealer number two. But first the collector consults with dealer number one, who happens to be a friend. He tells the collector that the sculpture once fell off a truck and broke into pieces, and that the sculpture had "more glue than marble." He advises the collector that he would be a fool to purchase the sculpture, and says that the second dealer is "looking for suckers." As a result, the collector backs out of the deal. The second dealer sues the first dealer for defamation, seeking lost profits and punitive damages.

What are the first dealer's defenses? Apart from the statute of limitations, four key defenses are possible:

1) Expression of Opinion: First, the defendant will claim that the statements are expressions of opinion protected by the constitution. Both the U.S. and the New York State constitutions provide certain protections for free speech. The New York constitution is broader, so if the case is brought in New York, it is the state constitution that will determine whether the defendant's statements qualify as protected opinion. Under the New York constitution, a statement is protected as opinion if all of the following three statements are true:

(a) The language lacks a readily understood meaning.
(b) The language is incapable of being proven false.
(c) The specific text or the social context signals to the reader that the statement is opinion rather than fact.

On these facts, a U.S. district court in Manhattan ruled that the dealer's statements are *not* protected as opinion. They purport to be statements of fact about the history of the sculpture and the business practices of the second dealer. As such, they can be proven false and may be understood by the reasonable listener as statements of fact. Thus, there is no protection under the New York constitution.

2) Matter of Public Concern: The second defense will be that the defendant's statements regarding the sculpture were made on a matter of public concern, and thus require an additional showing under New York law that the defendant acted with "gross irresponsibility." This would probably be a valid defense with respect to the statements about the sculpture's history and value, assuming that the sculpture is a sufficiently important work of art to qualify as a matter of public concern and that the defendant's statements were not knowingly false. But the defendant's statements also attack the second dealer's reputation, and that is *not* a matter of public concern. Thus, this defense fails also, which, by the way, brings up an important point. If you are going to attack the authenticity or quality of the art, direct your statements to the art and not to the character or reputation of the proponent of that art.

"If you are going to attack the authenticity or quality of the art, direct your statements to the art and not to the character or reputation of the proponent of that art."

3) Common Interest. The defendant will next argue that his remarks are protected by a qualified privilege based upon common interest. Under New York law, good faith communications by a party having an interest in the subject or a moral or societal duty to speak are protected if made to a party having a corresponding duty or interest. This looks like a good defense in this case: the collector came to the defendant, his friend, for advice

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[3] *Sepenuk v. Marshall*, 2000 U.S. Dist. LEXIS 17823 (S.D.N.Y. 2000).

and guidance with respect to purchasing the sculpture from the plaintiff. The defendant has a right to provide that advice and guidance as he sees fit. But a word of caution is in order. This defense is only a qualified privilege, which means that it can be overcome if the plaintiff demonstrates that the defendant's statements were knowingly or recklessly false. In this case it seems odd that the defendant would sell the sculpture to the plaintiff for good money and then later claim that anyone would be a fool to buy it. The facts suggest, perhaps, that the defendant's statements to the collector were motivated by spite or ill will toward the other dealer, in which case the defense would be defeated. This brings up another important point. When I said earlier that the odds of being sued are small, I was assuming that the words were spoken or written in good faith. If the intent really was to libel or slander someone or to maliciously disparage a work of art, then all bets are off.

4) Truth: The last defense would be truth. If the defendant's statements were truthful, there can be no claim for defamation. In our example, the question is whether the sculpture actually did fall off a truck, break into pieces, and undergo repair with large quantities of glue.

MALPRACTICE

So far we have been discussing defamation and disparagement. The other type of liability to be aware of is professional malpractice, or negligence. Professional malpractice occurs when you undertake a duty of reasonable care for someone and you breach that duty, causing damages.

For example, imagine you are an art historian hired to render an opinion about the authenticity of a painting. You glance at a black and white photo of the painting and advise your client that the painting is authentic. Relying on your opinion, the client purchases the painting for five million dollars, only to find that it is a fake. The client could sue you for damages, claiming that in rendering your opinion you did not comply with the standard of care. One of the issues will be whether a reasonable expert would have examined the actual painting rather than simply relying on a photo. Other issues include whether you did adequate research and whether you have the necessary qualifications to hold yourself out as an expert.

ERRORS & OMISSIONS INSURANCE

Although the chances of being sued are small, there is always a risk. Even if you have done nothing wrong, it can cost a small fortune to dispose of a frivolous lawsuit. Further, juries are unpredictable.

How many at this conference have authored or plan to author a book? If so, do look again at your publishing contract. I can almost guarantee that the contract contains an indemnity provision pursuant to which you, the little author, agree to indemnify the giant publisher for all its expenses and liabilities in connection with any lawsuits brought by third parties, even if the lawsuit turns out to have no merit. There is unlikely to be any provision making you an additional insured on the publisher's liability policy. If you receive a form of contract with an indemnity provision, my advice is to cross out the provision and print your initials. The publisher may decide it is not something worth making an issue about; or it might agree to add you to its insurance; or it might not notice, just as it was hoping you would not notice. Otherwise, you could be stuck paying not only your own attorney's fees and settlement contribution or judgment, if any, but those of the publisher, as well.

How many authors could afford to pay hundreds of thousands of dollars to a large Wall Street law firm hired by the publisher at rates of $600 per hour? That is why most prudent professionals carry Errors and Omissions insurance. These policies provide two basic types of coverage. With the first type, the insurer will pay to defend the insured in the event of a lawsuit, including attorney's fees and litigation costs. With the second type, the insurer will pay the amount of any settlement or the amount of a judgment if the insured is found legally liable. Most policies cover not only malpractice but also defamation, including libel, slander, product disparagement, and infliction of emotional distress. There is no coverage for fraudulent, malicious or dishonest acts.

CONCLUSION

In closing, I shall summarize the elements of defamation and product disparagement. The elements of a defamation claim under New York State law include a false and defamatory statement of fact regarding the plaintiff that is published to a third party by the defendant and that results in injury to the plaintiff. But the plaintiff need not show special damages if the statement disparages the plaintiff's office, profession or trade.

Statements that are defamatory *per se* and do not require proof of special damages include the following: to say of a physician that he is a butcher, of an attorney that he is a shyster, of a clergyman that he is the subject of scandalous rumors, of a chauffeur that he is habitually drinking, of a merchant that he sells adulterated goods, of a public officer that he has accepted a bribe.

The elements of a product disparagement claim under New York law entail the following: a false statement that disparages or reflects negatively on the quality, condition or value of property; publication of that statement to a third person; malice (hatred, ill-will or spite); and special damages (i.e., causally related losses having pecuniary or economic value and that are fully and accurately stated).

The First Amendment of the U.S. Constitution, guaranteeing freedom of speech, contains no "wholesale defamation exception for anything that might be labeled 'opinion'."[4] Statements of opinion on matters of public concern are protected under the First Amendment only as long as they do not contain a provably false factual connotation. Also protected under the First Amendment are "statements that cannot reasonably be interpreted as stating actual facts about an individual."

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[4] *Milkovich v. Lorain Journal Co. et al.*, 497 U.S. 1 (1990).

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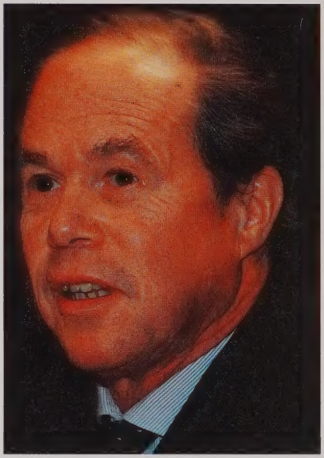
ARE OPINIONS DANGEROUS THINGS TO GIVE?

SUITS AGAINST THE POLLOCK-KRASNER AUTHENTICATION BOARD

RONALD D. SPENCER*



Sharon Flescher wrote panelists a letter saying we had fifteen or twenty minutes and then added a couple of restrictions, namely, that we must have a lively, intelligent discussion, with no *ad hominem* attacks or self-promotional speeches. And my wife added, "Don't bore them with legalistic detail." So all that pretty much cut the heart out of this talk! In any event, I will be discussing three cases in which the expert opinion giver successfully defended itself, but only after quite a bit of expense and emotional *sturm und drang.*

RESTRAINT OF TRADE—*VITALE* AND *KRAMER*

The first two cases involved claims of antitrust violations against the Pollock-Krasner Authentication Board, which had been set up by the Pollock-Krasner Foundation to authenticate paintings by Jackson Pollock and his wife, Lee Krasner. In the first case, brought in 1993, the plaintiff, Joan Vitale, claimed that she had purchased a painting at an auction in Pennsylvania in 1969.[1] Shortly after that she took the painting to Lee Krasner at the Marlborough Gallery, which was representing Pollock at the time. Krasner and Don McKinney, then president of Marlborough, looked at the painting and told Vitale to come back the next day. When Vitale returned, New York City detectives awaiting her arrival said: "We're taking your painting in connection with the investigation of a forgery ring."

That was 1969. Vitale did not see her painting again for five years. When she did, she still believed it was by Pollock. She took it to various galleries and auction houses, but was told the same thing by all: the Pollock authentication committee, at the time headed by Lee Krasner, would have to authenticate the painting before they would buy or auction it. She was still making the rounds in 1978 when the Jackson Pollock catalogue raisonné by Eugene V. Thaw and Francis O'Connor was published by Yale University Press.[2] In it, in a section devoted to "False Attributions," was an image of her painting. That didn't

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[1] *Vitale v. Marlborough Gallery, The Pollock-Krasner Foundation, et al.* No. 93 Civ. 6276, 1994 WL 654494 (S.D.N.Y. July 5, 1994).

help sales either. But nobody heard from Mrs. Vitale again until 1993.

That year, the Pollock-Krasner Foundation received a copy of a full-page newspaper article that said the Foundation had been sued by Mrs. Vitale for unlawful restraint of trade and monopolization in violation of the Sherman Antitrust Act. Mrs. Vitale and her skilled lawyer, who specialized in antitrust claims, had determined that the Pollock-Krasner Authentication Board was monopolizing the authentication and sale of Pollock and Krasner paintings for the purpose of reducing the number of paintings on the market and driving the prices up to the benefit of the Foundation, which owned Pollock and Krasner paintings. Those of you in the art world would say, "That's nonsense. The art world does not work like that." If we found twenty authentic works by Rembrandt tomorrow, the price of Rembrandt paintings would not drop one iota. But to antitrust lawyers, this kind of claim made sense because it treated art like widgets. Of course, any authentication board or committee that the art market recognizes as the last word on authenticity questions does have a *kind* of monopoly, but it is a monopoly that is quite different from the one that Microsoft was alleged to have. In any event, Vitale's claim was barred by the four-year statute of limitations of the Sherman Antitrust Act. She had brought the suit in 1993 and claimed that she had been trying to sell the painting from the time she got it back from Marlborough in 1974, and that right up until 1993 she was feeling the effects of this conspiracy to restrain trade. The judge dismissed the case under what some people would term technical grounds, namely the four-year statute of limitations.

> **"Mrs. Vitale and her skilled lawyer, who specialized in antitrust claims, had determined that the Pollock-Krasner Authentication Board was monopolizing the authentication and sale of Pollock and Krasner paintings . . ."**

Her lawyer was not daunted. The next year he found a plaintiff, David Kramer, who lived in Santa Fe and did not have the statute of limitations problem.[3] Kramer had applied to the Authentication Board in the early 1990s to authenticate a purported Pollock painting. He had signed the Authentication Board's standard application, in which the Board promised to use its best judgment when giving an opinion on the authenticity of his painting, and in which he agreed to not sue the Board for its opinion. An arbitration provision in that agreement mandated arbitration and therefore would have precluded him from bringing a claim in a court. We chose not to defend on that ground, however, because we thought we had a better chance in court.

Kramer, unlike Vitale, had signed an agreement that said he would not sue, but Judge Harold Baer, Jr, in federal district court in New York, went right to the issue of restraint of trade, that is, whether you could monopolize this type of activity. Judge Baer dismissed Kramer's case and ruled, I think correctly, that there was no economic rationale for The Pollock-Krasner Foundation or Authentication Board, nor for that matter Christie's and Sotheby's, who were part of the conspiracy alleged in Kramer's complaint, to restrict the number of Pollock paintings. On the contrary. Sotheby's and Christie's would want to sell as many Pollock paintings as they could, but they would not want to sell inauthentic works since they warrant the authenticity of works they sell.

We asked the judge to order financial sanctions against the lawyer who brought the case, on the grounds that the lawsuit was frivolous. Judge Baer denied that request as moot, saying that he did not want to waste the scarce judicial resources of

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[2] Francis V. O'Connor and Eugene V. Thaw, *Jackson Pollock, A Catalogue Raisonné of Paintings, Drawings, and Other Works*, 4 vols., New Haven and London: Yale University Press, 1978.

[3] *Kramer v. The Pollock-Krasner Foundation, et al.*, 890 F. Supp. 250 (S.D.N.Y. 1995).

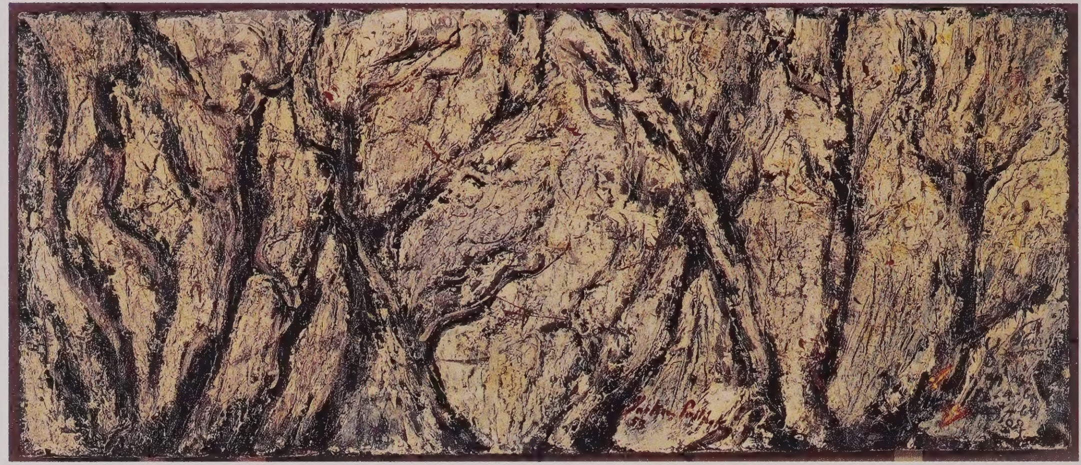

FIGURE 1. *Vertical Infinity.* Oil on canvas. 11" x 26".
Submitted to the Pollock-Krasner Authentication Board in 1994 and the subject of a subsequent lawsuit.

the court determining whether the painting was authentic. But I do not think the issue was moot. In any event, we won, but one still wishes to discourage frivolous lawsuits. Federal rules of civil procedure provide for financial sanctions against lawyers who bring such suits. What is a frivolous lawsuit? It is basically one in which the lawyer has not done a reasonable investigation into the facts of his client's claim or a reasonable investigation into the law based on those facts. A reasonable factual investigation of Kramer's painting, we argued (and lost on this issue), would have shown important discrepancies. Kramer said that he bought the painting from one Judge Tate in Santa Fe, who supposedly acquired the painting directly from Pollock when he and Pollock were both in the U.S. Navy. The slightest research, however, would have revealed that Pollock was never in the Navy. Moreover, there was no bill of sale. Nor was there any indication that Judge Tate had ever told anybody that he owned a painting by Pollock during the many years he owned the painting. The plaintiff's attorney, we argued to Judge Baer, did not have to be an art scholar to make these basic kinds of factual inquiries.

LARIVIERE — A FRIVOLOUS CLAIM

In 1994, Kenneth Lariviere, a resident of Vancouver, also applied to the Authentication Board and signed an agreement that he would not sue the Board because of its opinion. But after he was told that his painting was not a Pollock (Fig. 1), Lariviere sued the Authentication Board for damages.[4] He also asked the court to order the Authentication Board to publish the painting in the supplement to the Pollock catalogue raisonné. That raised a separate issue of whether a judge could order an author to place something in a catalogue raisonné that the author thought was inauthentic. We never got to that issue, but we did address whether the agreement that Lariviere had signed stating that he would not sue was a valid, enforceable agreement. In New York and in many other states, the courts will enforce such agreements in some cases and not in others. Judge Emily Jane Goodman agreed with us and granted the Authentication Board's motion for summary judgment. She said that the agreement was enforceable and that Kramer could not sue because he said he would not. We also brought a counterclaim that said: You breached your agreement when you said you wouldn't sue us and, therefore, we want damages the cost of defending the lawsuit. Again, the judge agreed with us. So, for the first time[5] to my knowledge, a court held:

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[4] *Kenneth Lariviere v. Eugene Victor Thaw, Ellen G. Landau, Francis V. O'Connor, and William S. Lieberman, t/a the Pollock-Krasner Authentication Board, Inc., and the Pollock-Krasner Authentication Board, Inc.* Index No. 100627/99, 2000WL 33965732 (Sup.Ct.N.Y. County June 26, 2000).

- Agreements not to sue an art authentication board or committee are enforceable;
- If you breach that agreement, you are liable for damages, which include the defendant's legal defense costs.

We also asked for the sanctions we didn't get in the two federal cases previously discussed, and this time, the New York judge ordered sanctions against both the lawyer and his client, Lariviere.

"That raised a separate issue of whether a judge could order an author to place something in a catalogue raisonné that the author thought was inauthentic."

The Authentication Board, reprising its argument in federal court, argued to Judge Goodman that there should have been a reasonable factual investigation by Lariviere's lawyer before he brought the case as to whether or not Lariviere's painting was authentic. There were many things he could have checked, such as Lariviere's statement that he bought the painting through the estate of Pollock's art teacher, Professor Schwankovsky, who taught Pollock in 1927 at a Los Angeles high school. When we looked into it, we found that Lariviere had bought the painting "as is" at auction in British Columbia for CD$4,000. And the New York court's decision came down hard on the fact that plaintiff's lawyer had done little to investigate the provenance of the painting.

I believe that this decision is a major victory for freedom of scholarship, and it should give us all substantial comfort, even though the Duveen case is still out there.[6] We now have a decision in New York State that protects freedom of scholarly opinion with the threat of court ordered financial sanctions against careless plaintiffs and their lawyers.

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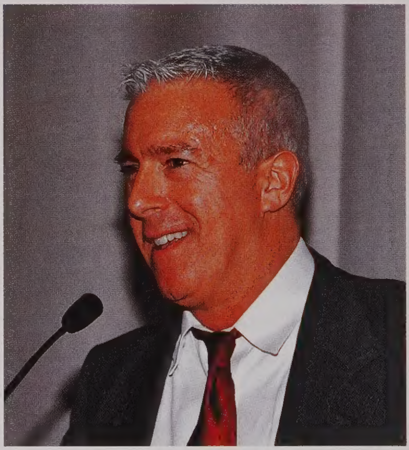
[5] See Ronald Spencer, "A Legal Decision in New York Gives Experts Protection for Their Opinions on Authenticity," *IFAR Journal*, Vol. 3, no. 2, 2000.

[6] *Hahn v. Duveen* 133 Misc. 871; 234 N.Y.S. 185 (Sup. Ct. N.Y. Co. 1929). Mrs. Andrée Hahn of Kansas sued art dealer Joseph Duveen for damages resulting from his comments to a news reporter questioning the authenticity of her painting, purportedly Leonardo da Vinci's *La Belle Ferronière*. Duveen settled out-of-court for $60,000. [Editor's Note: See also discussions on pp. 66 and 74, this issue of *IFAR Journal*.]

INSULATING YOURSELF FROM LIABILITY

PETER R. STERN*



With authenticity disputes, we basically start with the situation of the unhappy owner who threatens litigation after his work is rejected. He starts a lawsuit sounding in disparagement, negligent appraisal, or malpractice. The key thing to keep in mind, as has been mentioned, is that even if you are successful, prolonged litigation can cost hundreds of thousands of dollars. I'm sure that the three cases just described concerning the Pollock-Krasner Foundation cost over a million dollars, and it is my understanding that the Foundation stopped producing supplements to its catalogue raisonné as a result of those lawsuits.

For everyone working on a catalogue raisonné, I have one recommendation: armor. A first step is to incorporate in order to insulate yourself from personal liability. In incorporating, you could consider applying for tax exempt status so that grants or donations could be deductible by those people who help to fund you. The case of *Hahn vs. Duveen* has been mentioned several times.[1] Its lesson is this: do not volunteer. Sir Joseph Duveen, a noted art dealer, basically gave an interview to the *New York World* in 1920, in which he said that Mrs. Andrée Hahn's painting of *La Belle Ferronière* was not by Leonardo da Vinci. Hahn sued. The result was a four-week trial ending in a hung jury. The case was ultimately settled by Duveen for a great sum of money, but in the course of its decision, the court said the following: "Whenever a man unnecessarily inter-meddles with the affairs of others with which he is wholly unconcerned, such officious interference will be deemed malicious." So, it is important to avoid being viewed as an officious inter-meddler.

A more recent case involving a painting by Modigliani is instructive. The painting was offered for sale in 1997 at a major auction house. On the morning of the auction, a newly self-appointed Modigliani expert working on a catalogue raisonné decided unilaterally to write a letter to the auction house saying that in his opinion the painting was a fake. The result has been a four-year lawsuit against the Wildenstein Institute [which is sponsoring the new Modigliani catalogue raisonné], and has undoubtedly cost hundreds of thousands of dollars.[2]

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[1] *Hahn v. Duveen. 133 Misc. 871; 234 N.Y.S. 185* (Sup. Ct. NY Co., 1929). Editor's Note: See also discussion on pp. 66 and 73, this issue of *IFAR Journal.*

[2] Editor's Note: See also discussion on p. 49 of this issue.

My second recommendation to the expert is the use of a form that the owner of a work must sign before the expert provides an opinion.

The first major case I ever tried, *Travis v. Sotheby's*,[3] involved the failure to use a form. It concerned the donation of a painting purportedly by Sir Joshua Reynolds to the Metropolitan Museum. As a favor to the museum, the expert at Sotheby's agreed to appraise the painting for donation purposes. After consulting with Sir Ellis Waterhouse, the then-living expert on Reynolds, she decided that it was not a Reynolds, but was, rather, a great work by Tilly Kettle. The owner did not like the expert's opinion and sued. Sotheby's has an official form for appraisals, but in that particular case, because it was doing a favor for the Met, the form was not used. Had the form been used and had Mr. Travis been required to sign the form, I do not believe that the lawsuit would have occurred. (Ultimately, after very expensive litigation, the case was dismissed.) More recently, the case Mr. Spencer mentioned, *Lariviere v. Thaw*,[4] clearly upheld the use of a form.

A third recommendation: As part of his/her procedure, an expert should not rely on photographs, but should make every effort to examine the object physically. A case I find somewhat humorous is *Aryeh v. Christie's*,[5] which concerned a Fabergé egg. In 1977, Mr. Aryeh purchased a Fabergé Imperial egg at Christie's Geneva. He had doubts about it, and Christie's supplied him with an opinion from a Fabergé expert, A. Kenneth Snowman, saying that the object was, in fact, an Imperial egg. Eight years later, in 1985, Mr. Aryeh decided to sell the egg at Christie's New York, and the auction house came up with a new letter from Mr. Snowman saying "No, it is not an Imperial egg." This time Mr. Snowman had examined the egg. The first time he had only looked at a photograph.

The submission form should state that the catalogue raisonné has no responsibility for loss or damage of the object that is being reviewed, and that any insurance concerning the object is the obligation of the owner. The form should also require the owner to submit as much information as possible, including provenance and exhibition history. An example of a case where that would have benefited the owner is *Kirby v. Wildenstein*.[6] Kirby was the owner of a painting by Jean Béraud, which was consigned to Christie's for sale at auction. Briefly, the late Daniel Wildenstein, an expert on French painting who was sponsoring a catalogue raisonné on Béraud, looked at it and decided he did not like it. But there was a label on the back from Paris-based art dealer Bernheim-Jeune, and further investigation by contacting Bernheim-Jeune revealed that the gallery had a record of purchasing the painting in 1907 directly from Béraud. So Mr. Wildenstein had to change his opinion, but, ungraciously, the catalogue raisonné entry later stated that the work was "abusively restored and cleaned." I personally do not agree with catalogues raisonnés taking positions on the condition of objects, but that one did. The painting did not sell at the Christie's auction, and Kirby sued Wildenstein. Mr. Kirby's claims were dismissed, however, on a motion for summary judgment by Wildenstein.

The submission form, in my opinion, should be signed by the owner, no one else, and not by anyone saying that he is an agent. The owner should represent that he/she is the owner and that no one else has an interest in the work. You do not want someone to come in later and claim that he didn't authorize the submission. A case in point is *McNally v. Yarnall*, which involved works attributed to John La Farge.[7] James Yarnall, a scholar working on the La Farge catalogue raisonné, was asked by a dealer named

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[3] *Stuart Travis v. Sotheby Parke-Bernet, Inc., C. Hugh Hildesley and Brenda J. Auslander Index No. 4290/79* (Supreme Court of the State of New York, Nassau County, 1982). (Oral decision rendered by Mr. Justice Francis X. Becker following motions to dismiss plaintiff's case).

[4] See discussion this issue, p. 72.

[5] *Arheh v. Christie's International, Index No 1030/86 (Supreme Court of the State of New York, 1986).*

[6] *Roger W. Kirby v. Daniel Wildenstein and Fondation Wildenstein 784 F. Supp. 1112; 1992 U.S. Dist. LEXIS 2292 (S.D.N.Y. 1992).*

William Vareika to review works that were intended to be included in an exhibition at his gallery in Newport, Rhode Island. Yarnall did not like some of the works and made a statement attacking the competence of the owner, Sean McNally. Mr. McNally sued Mr. Yarnall. (Mr. McNally also sued me.) But had the submission form been signed by the owner, in all likelihood there would not have been a lawsuit, or if McNally lost the lawsuit, as he did, he would have been obligated to reimburse Yarnall for all of his attorney's fees.

The submission form should say that no one is guaranteeing the correctness of the project's decision, that the only obligation of the project is to exercise reasonable judgment in considering the work. The submission form should also contain four other important provisions:

1) that the owner will not sue;
2) that the owner releases and discharges the project from any claims, liabilities, losses, and damages, including attorneys' fees relating to the project's decision;
3) that the owner agrees to indemnify and hold harmless the project from any and all claims, liabilities, losses, and damages – that is the clause that requires him to pay attorneys' fees if he sues, and;
4) that the project employees will have no liability with respect to anyone by reason of the project's decision.

I also like to include a statement to the effect that the project can choose to change its mind, because from time to time that happens – for example, the Kirby case that I mentioned before.

Another fascinating case of an altered opinion involved a Brancusi sculpture that was shown to Sidney Geist, the then-expert on Brancusi, who said it was not by Brancusi. About five years later, however, a photograph of Brancusi's studio was found in the Pompidou Center that showed the sculpture in the studio. As a result of being shown the photograph, Geist acknowledged that the work was, in fact, by Brancusi. Hence, I believe that the form should anticipate the possibility that an opinion could change – both positively or negatively.

I do not think that a catalogue raisonné project should give any kind of verbal opinions. The forms that I have used have three variants stating that the project is expressing an opinion either of: 1) inclusion, 2) non-inclusion, or 3) inability to reach a decision. Also, I try to emphasize that the project is expressing an opinion and not making a statement of fact.

The submission form should also authorize the project to reproduce an image of the object in the completed catalogue raisonné.

So, just to summarize:

- avoid volunteering;
- avoid oral requests and opinions;
- avoid requests from people other than the owners;
- avoid opinions without physical examination of an object; and
- avoid saying an object is a fake.

Instead of saying the object is a fake, say it will or will not be included in the catalogue raisonné.

On the pro-active side, I strongly recommend that you create a corporation and that you utilize a form which disclaims liability, which says that the owner will not sue, and which holds the project harmless from any claim.

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[7] *Sean M. McNally and Janet McNally v. James Yarnall and the Metropolitan Museum of Art 764 F. Supp. 838 (S.D.N.Y. 1991).*

INSURANCE FOR ART SCHOLARS AND WRITERS

ELLEN HOENER ROSS*

We all receive mail from our broker that says "homeowner's insurance." We glance at it, perhaps look at the limits, and then write a check and file it. We then feel comfortable that "we have homeowner's insurance." Unfortunately, there is no product specifically designed for an art researcher or art scholar. The exposure generally falls under "professional liability," or "E&O" – Errors and Omissions – coverage. My discussion will address the basic terms and conditions of a miscellaneous professional liability policy. I will highlight endorsements that specifically address authorship, publishing, and the professional activities of an art researcher, such as appraising.

CLAIMS MADE

Most professional liability policies are written on a "claims made" basis. This means the claim must be brought to the attention of the insurance company during the policy year. The purpose of the insurance is to cover you for an amount you are legally required to pay to compensate others for a loss resulting from an error, omission, or negligent act committed by you in the conduct of your business.

LIMITS

Policies are generally issued in integrals of a million dollars. You can get smaller limits, but the amount of the coverage should be based on the financial position of the insured, the activity or the risk. When you are considering the amount of insurance you are purchasing, you must take into account the "payment of defense" costs. Defense costs are either paid within the policy limit or in addition to the limit, meaning that your million-dollar policy is going to pay for legal fees and the judgment or just for the judgment itself, with defense costs unlimited. This is a key point in a "claims made" policy.

Most policies have a deductible or retention that will be borne by you, the insured. Some policies say that you have to pay the deductible only if there is an actual loss. Most policies include an annual aggregate. "Claims made" policies have "prior acts" coverage, available if the insured has no knowledge of a potential claim at the effective date of the policy, and there was no continuous coverage in effect previously. "Prior Acts" coverage must be purchased at the inception of the policy and is a warranty under the application. "Claims made" policies also have optional extensions in the reporting period. If the policy is cancelled either by the company or the insured, the reporting period – the period in which you can make a claim – can be extended for 12 months, 24 months, even 36 months, or, in some cases, for unlimited periods. This coverage is elected by the insured and is subject to the regular terms and conditions of the policy. Also, a new trend is choice of counsel. Many policies, usually those with defense costs "within the limit," allow you to retain your choice of counsel subject to the insurer's prior approval. With policies where defense costs are "outside the limit," the insurance companies generally want control of the counsel.

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* Ellen Hoener Ross is Vice President, Acordia, Inc., an insurance company in New York.

PROFESSIONAL POLICIES

Some insurance products specifically address the professional concerns of the art scholar. For example, there are programs for appraisers, whether art or real estate appraisers. They follow the forms, the terms and conditions I previously discussed; they are "claims made" policies that can be written for smaller amounts. You can buy a $100,000 policy, a $500,000 policy, a $1,000,000 policy. The premiums can be very competitive: the price range is $250 to $1,000. Defense costs are generally outside the policy limits, and most policies have a modest deductible of $1,000. To bind the coverage, the insurance companies require an application, a resumé, and a financial statement, since the policy is based on revenues. You have to indicate expected revenues from your appraising activities, and you need a clean claims history.

INSURANCE FOR OPINIONS

Insurance for art experts who provide opinions regarding authenticity is written on a miscellaneous professional liability form, and we try to tailor the policy to your needs. It is designed to pay the legal obligation of the insured by reason of a wrongful act in the performance of, or failure to perform, his/her professional duties. What is a wrongful act? By the insurance definition, it is any alleged act, error or omission, misstatement, misleading statement, personal injury, or breach of duty by the insured in performing professional duties. As I said, these are "claims made" policies. As with appraisal policies, a financial statement, a resumé, and a claims history are needed to bind the insurance in an application.

There are specific programs for authors and publishers, and authors' liability policies designed for writers of books, manuscripts, pamphlets, and other literary works. This coverage can be extended to include subsequent editions, condensed versions, revised versions, and related materials. Features of the "authors' liability policies" include coverage for the standard perils of libel, slander, invasion of privacy, and copyright infringements, as well as plagiarism, misappropriation of ideas, defamation, infliction of emotional distress. Also included are punitive damages, legal costs, and liability coverage for perils assumed under contracts, and most of the policies are worldwide.

Author liability policies can be made on "an occurrence" basis. That is, you can buy the product for a specific book or publication. There are also endorsements available for revised editions, reprintings, changes in the original manuscript. In addition, coverage can be purchased for errors and omissions arising out of the literary or artistic content of the published material; this includes bodily injury, property damage, and defense costs. Thus, this coverage combines a "claims made" policy with an "occurrence" policy. In most cases, insurance companies will give a voice in the decision-making of a settlement to the issuer or the author. To bind the coverage, the insurance company requires an application, a copy of the manuscript or proof, a copy of the contract, an attorney's opinion letter, the applicant's resumé, financial statement, and a claims history. There is also an insurance product for book liability for publishers that is very similar to the authors' coverage. We can add an endorsement to the policy called an author's protection plan, which allows the publisher to add the author as an additional insured for the project.

So, why do you need this insurance? You are buying it to protect yourself against the devastating impact of lawsuits and the cost of defending yourself. What can you do to best protect yourself? You can consult a broker. You should review the policy – its terms and conditions – carefully. As we have discussed, there is no single product specifically made for you, so we have to be very careful in tailoring one to fit your specific needs. Look at the named insured. Make sure that all the people involved in your project are included as named insureds. Most applications include a statement regarding the activity of the insured. Make sure you provide a complete description of what you are doing. Determine your exposure, and purchase the proper amount of coverage. Consider the "defense within" or the "defense outside" aspect when you are purchasing the amount of insurance. Remember, if a policy is a "claims made" contract, you should address the issue of prior acts and also purchase "tail coverage" that extends the reporting period. And, most importantly, review the exclusions. All policies have exclusions, and some can be deleted, others cannot. It is very important that you review the exclusions of the policy.

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LEGAL LIABILITY FOR GIVING OPINIONS
Q&A

THEODORE N. KAPLAN, MODERATOR (TK)
STEVEN MARK LEVY (SL)
RONALD D. SPENCER (RS)
PETER R. STERN (PS)
ELLEN HOENER ROSS (ER)

Q **TK:** Can anyone define the professional responsibility of a person writing a catalogue raisonné? Is there a definition?

A **ER:** The insurance industry does not have a product that specifically addresses this. The answer I got from two insurance companies is that professional responsibility is what is normal and acceptable to the industry. It doesn't help, I know.

Q **TK:** Must a catalogue raisonné author accept for review every painting that someone says is by that artist? Does he/she have the right to say "I don't want to look at your art"?

A **SL:** Not to denigrate the profession of art appraisal and authentication, but a catalogue raisonné author is not a professional in the legal sense of the term like a lawyer or doctor. I don't think he/she is subject to a standard of care that's been articulated. As a private person writing a private book, you have a right to include or exclude anything. However, in this day and age of litigiousness and creative lawyering, someone could argue that by undertaking a catalogue raisonné you've undertaken a duty of due care to include the good works and exclude the bad ones. A clever lawyer could haul you into court even though in reality this is a private book, and you're a private author, and you have a right to do what you like . . . Many professional organizations – art conservators, art historians – have codes of ethics that sometimes go a little too far. They make broad statements saying that members owe a duty not only to clients but to the whole world, which can come back to haunt them later because plaintiffs will pick up that document and say, "Aha, we don't need legal precedent. Their own organization says there's a duty." So you have to be careful about broad pronouncements in your ethical guidelines.

"Let's suppose I've published my catalogue and subsequently decide a picture is not by the artist Do I then have an obligation or privilege to go ba to the owners and inform them of the change?"

Q I am Charlie Bergman, Chairman of the Pollock-Krasner Foundation, and I would like to make a clarification, if I may, to Peter Stern's fine presentation. We did not terminate the Authentication Board because of the lawsuits. We terminated it because the fifth volume [supplement] of the catalogue raisonné [1995], in our best judgment, really closed the issue of the Pollock *oeuvre*. We felt that we had done yeoman's service by that fifth volume. But it would perhaps be of interest to this audience to know that the three lawsuits, particularly the last one, were sustained by us at enormous expense, and because of our determination that scholars should have the right and privilege to exercise their professional judgment. My colleague Eugene Thaw and I felt we had a moral and ethical responsibility to professionals in the art field to see that this freedom would prevail. And, if I may, I would like to conclude with a plug for IFAR. Today, if somebody calls us and wants to have a Pollock authenticated, we send them to IFAR, which has assembled some very good experts and does a splendid job seeing that resources are made available to such applicants.

Q This question is directed to any of the lawyers on the panel. Assume the following: A client comes to you with the following situation. Six years ago he purchased a painting for which he paid two hundred thousand dollars from a very responsible dealer. A friend, who happens to be an art expert, just told him that the painting is not genuine. Another friend told him about the statute of limitations, the time by which to begin suit. He comes to you and asks: "What do I do?" You listen to him and you realize this painting is probably a fake, and that the statute has run. In every state except Louisiana, the Uniform Commercial Code warrants goods for four years pursuant to a contract. Six years have passed. What advice do you give him? Do you tell him to commence the lawsuit knowing very well that you have to allege that the painting is a fake and therefore unmarketable, and that you will lose the lawsuit? Or do you say: "I haven't heard what you said. Why don't you try to sell the painting," realizing that he might very well be sued within the four years commencing when the subsequent sale has begun. What do you advise this client?

A **PS:** First, I would try to determine whether there is a basis for a fraud claim because that would extend the statute of limitations. If so, I would make a claim for fraud.

Q Assuming your investigation reveals there's no basis for fraud.

A **PS:** Then I am not sure what I would do. However, I would tell the client that he should only sell the work "as is," without any representation as to its authenticity.

TK: This points up a very large problem. When I was an attorney at Sotheby's, we would knock our heads against the wall because after trying, unsuccessfully, to authenticate something, then rejecting it for sale, we would see it in someone's Madison Avenue window. Experts asked me, "What can we do?" If knowledgeable people have decided that a work is not authentic, how do you take it off the market? And if your hypothetical client decides not to sue and asks his "expert" friend to please keep his mouth shut and puts the work on sale, what will protect the market from that?

A **RS:** Let me lend a little authenticity to the question. Earlier, I discussed the Kramer lawsuit, which was decided by a Federal judge in 1996. In 1999, I received a call from Helen Harrison, Director of the Pollock-Krasner House and Study Center in East Hampton, to say a well-known New York dealer was there looking at various paints that Pollock had

"I think it would be a scholarly service to put various fakes and false attributions into a catalogue raisonné."

used because the dealer had a contract to sell a painting for nine hundred thousand dollars. She looked at the painting and said, "That is the same painting that was the subject of the Kramer lawsuit." She had the dealer contact me, and I told him to go back to the seller. The dealer replied, "I have all kinds of forensic evidence." I said, "Well, go ahead." The point here is that even public, legal decisions by judges that are reported in the media do not stop the recirculation of inauthentic works.

Q Let's suppose I've published my catalogue and subsequently decide a picture is not by the artist. Do I then have an obligation or privilege to go back to the owners and inform them of the change? Or, subsequent to that, if I have not informed them, the picture comes on the market and is being sold on the basis of my previous inclusion of it in the catalogue, but I now know that information to be false, whether or not I intend to publish a revised edition of my book: A) do I have an obligation and B) am I protected by any of the waivers, which contain all the prescribed language that you previously suggested?

A **TK:** This goes back to the definition of professional responsibility.

PS: I've seen your waiver form, but I don't recall whether your form mentions the right to change your mind.

Q It does not, but we are changing our mind even as we speak.

A **PS:** If the form did contain the right to change your mind, I would feel more comfortable telling you that you could change your mind.

RS: The form that the Warhol Authentication Board has used for the last few years provides that it has the right to change its mind. If it does, it will notify the original applicant and the applicant then has an obligation to notify any buyers from the applicant. Also, the Board has the right to publish its change of mind.

Q **TK:** If the work is going up at auction next week, does the Board have a duty under the Warhol form to tell the auction house that it has changed its mind?

A **RS:** There is no duty on the Authentication Board to do so, but if it does choose to do so, I don't believe it has any liability.

SL: I would say that as an author you should proceed in the normal course. If the week before an auction, you come to throw a wrench into the machinery, even if it's in good faith, you're asking for trouble.

PS: I strongly agree. I would be very careful about going to an auction house if you have changed your mind.

Q **RS:** But there is a related question. What do you do sir, aside from your catalogue raisonné, if you know that a public museum in the city, like the Metropolitan Museum, is about to spend millions of dollars on a work that you know to be a fake? Do you say anything? Or do you look at the *Hahn v. Duveen* case and say, "I'll keep quiet"?

CONSTANCE LOWENTHAL [former Executive Director of IFAR, from the audience]: A number of years ago John Rewald moderated a panel on catalogues raisonnés for IFAR. He noted that whenever he visited people's homes, he said to them, "Wouldn't you like to know what I think about the authenticity of that painting?" He never volunteered that it was fake. So if an expert thinks the Met is about to make a terrible mistake, write a letter and ask them to ask you.

Q I have a procedural question. Should you make subsequent owners reapply to a committee for an opinion, or get a statement of inclusion in the catalogue raisonné?

A **RS:** It is entirely optional, the whole process is entirely optional for any owner. There is no way to require a subsequent owner to apply.

SL: If I might just make a statement that an opinion is only as good as the facts and the research behind that opinion. As long as you make full disclosure – I feel this way because of A, B, C, and D – I think you're on very firm ground because then A, B, C, and D can be verified for their factual correctness and then your conclusions follow, although someone may disagree. What you don't want to do is just express your opinion in a vacuum and not give the reasons behind it or your qualifications for stating the reasons.

Q I wrote a catalogue raisonné on a seventeenth-century Dutch artist. I was supposed to supply forms to private collectors seeking permission to reproduce their photographs and to inform them that their material would be in my publication. What happens when they say, "No, I do not give you permission to photograph or reproduce my painting in your book. I do not like your opinion, I do not agree with it, and you do not have permission"? Unfortunately, this happened to me on more than one occasion. In one case, the collector wanted me to say a work was by my artist, but it was anonymous, so I said it was not. They declined permission to publish. In another case, I said a work was by my artist. They said they thought it was by Frans Hals. And so, although I gave my analysis of those paintings, the two works are not illustrated in my book.

Q **TK:** Are there other photographs of that painting from other sources?

A Not in other books.

A **PS:** I would just describe the work and say, "The owner declines to permit reproduction of the work."

> **"I believe that the authors of a catalogue raisonné should only give opinions when asked and should not go running around volunteering them."**

Q But what happens if there are twenty works? In my case, there were only two, but what happens if there are twenty or forty? There will be no book.

A **PS:** I think that it is going to be very rare that you will not get permission from the owner to publish a reproduction of the work.

SL: The owner of an artwork does not necessarily own the copyright. The artwork is a physical object, the copyright is separate and apart from the physical object. So I would go to the copyright owner.

TK: But she is dealing with a seventeenth-century artist. That is why I asked if there were other photographs, not owned by the owner of the object.

Q But then, why do we seek permission?

A **SL**: In my view, you do not need permission. The work is in the public domain, and the only issue is whether the photograph itself is copyrighted. If you have a public domain photograph, or if you take your own photograph, you do not need permission.

PS: I disagree with that. I think that even though the copyright is inapplicable, the owner still has the right to control the reproduction of his painting assuming the photograph is not in the public arena. So, whether you take the photograph or he supplies it, you still need his permission. If you obtain the photograph from third parties who are under no restrictions vis-à-vis the owner, you probably do not need the owner's permission.

Q Does the author of a catalogue raisonné have a legal obligation to reveal that the current owner of a work cannot possibly have good title because the work had in fact been stolen – although not by the current owner – assuming that the author discovers this in his/her research? Also, can the catalogue raisonné scholar who does not reveal it be sued because someone will be out of money down the line as the painting changes hands?

A **RS**: Are you referring to a case of Holocaust looted art?

Q No, I was not, although that would be a potential example.

A **TK:** The scholar knows it has never been retrieved; that it is still reported stolen?

Q Well, it may not be reported. Scholars look into provenance, and how things transfer. We discover things, so it is possible – in the course of probating an estate, for example. A crate can fall off a truck. Things happen.

A **RS:** First of all, if you have an agreement with the person who owns the work, you consult that agreement. But, presumably, it is silent on this issue.

TK: The owners would normally state that they have good title to the piece.

RS: In my view you do not have an obligation to run to the local police station to file information. I have seen this come up with Holocaust art, as a researcher discovers that there is a gap in provenance between 1936 and 1945. Of course, that does not necessarily tell us that the work was stolen by the Nazis, it just raises a probability. Well, you do not go to police stations on the basis of probabilities. I think you have an obligation to go to the owners, tell them what you think, and advise them to do what you think they ought to do. Beyond that, I would not worry about your own personal liability on an issue such as this. . . . If you're wrong, and it was not stolen, you would have a problem. If you are right, you do not have a problem.

TK: What he is saying is that you had better be very sure of your facts. Even if you know that the works were stolen, they may have been recovered in the interim twenty years, . . . or there may have been a settlement. You may not be privy to all the facts.

Q But what if you are privy and you know it is an undisclosed theft?

A **TK:** That is a complicated legal problem. Frank Feldman [Chair, IFAR Law Council], do you have the answer?

FRANK FELDMAN [from the audience]: There are certain risks in life that everyone must take. If this person is preparing a catalogue raisonné and feels very strongly, based on evidence, that the work was stolen, I personally feel that this person *does* have an obligation. I would go to the present owner and say in the most discreet way I can, "I believe that the painting you have may have been stolen, let's say, eight years ago in Oakland, California. I suggest you pursue this because I think you will not want to find that you are selling a stolen painting. I would love to include the work in the catalogue raisonné because I think it is genuine, but I also think it is stolen. God bless you." I do not think there would be any legal exposure to someone reporting facts that can be demonstrated – that there was a press report or whatever that a painting from a certain home was stolen. That is my feeling. I would take that risk.

Q I purchased a Léger drawing at auction some years ago and after purchasing it, I set about trying to piece together information on the background. I discovered that the drawing had gone through the hands of no less than five reputable dealers . . . who all, in turn, denied verification of the drawing. They had passed it back down through one another to the original owner. The original owner then offered it for sale at auction. So I, as an unsuspecting buyer, had the onus on me to prove that the drawing was not correct. I then asked the auction house to produce a letter for me from Galerie Louise Leiris. The letter, all of the lawyers on this panel would agree, was full of every loophole in the book. I then took the drawing to Paris myself and got the same vague response from the Galerie. Finally, I managed to produce enough information to be reimbursed by the auction house, with interest, after almost two years. No one in the chain had wanted to make a statement about the authenticity of the drawing, perhaps for fear of lawsuits. The drawing went back to the original owner and then back on the market, where I was an unsuspecting buyer. It has subsequently returned again to the original owner, and for all I know is possibly being offered for sale again. Is there a way to bring some legal action to bear on a work that has been deemed incorrect? I'll just add that I was part of a sting operation with the U.S. Customs Department in the case of fake Andy Warhol prints. In that situation, the prints were taken into possession by the Customs officials and are being kept in a warehouse with other material like that.

A **TK:** As I said before, this is one of the biggest problems. Once something is declared inauthentic by a recognized authority, there is nothing in our law to keep it from coming back on the marketplace. In the fraud case in Hawaii against the Center Art Galleries concerning fake Salvador Dalí prints, the Federal government offered the fakes for sale after the trial. They were put back into the marketplace by order of the Federal judge. Now what is going to happen to the Warhols after the case you described is finished? I do not know if Customs can continue to keep them. We do not have something like the French law where the droit moral holder can mark a work "Fake."

Q I've put on my body armor, so to speak, and gone into eBay, that marvelous marketplace, to shoot down several works purportedly by my artist. Now I've done it aggressively by e-mailing the sellers. I wonder if I should be holding my lawyer's hand when I do that. I do get responses, but generally it is not successful. One or two of the pieces have found their way to other auctions, but is there anything particularly wrong with that if it is just my opinion?

A **TK:** So long as it is your opinion.

PS: Well, I personally would not recommend it.

RS: This "opinion" issue has cropped up several times today, and we are not going to decide it this afternoon. But just to throw a skunk into the garden party, I would like to say that, in my view, saying "It's my opinion" does not give you any defense against a claim of disparagement or defamation. Indeed, the Supreme Court of the United States has said that if you say "John Jones is a thief," that is not different from saying "In my opinion John Jones is a thief." The issue is not whether you believe it honestly, but whether there are underlying facts to support that. So simply saying it is your "opinion" will not protect you.

Q **SHARON FLESCHER (SF):** This is a troubling issue to all ethical scholars: what is your obligation if you know a work is fake? Do you not say anything because that is the legally more cautious and, perhaps, more responsible thing? Or do you speak out and risk a lawsuit while acting more ethically, in the larger sense of the word, to your scholarship and community of scholars? Could all the legal minds on the panel and in the audience address this question?

A **RS:** The easier issue, if I may just slice this apart, is whether you have a fake and a false attribution section in your catalogue raisonné. Most catalogues raisonnés, I think, do not, and the reason is the same reason we've been talking about today. The Jackson Pollock catalogue raisonné had an eleven-page section called "Problems for Study," works about which they could not make up their mind. There were another thirty pages entitled "Fakes and False Attributions." These indeed were fakes and false attributions. The author of a catalogue raisonné whose form, as it should, gives the right to reproduce a fake or falsely attributed image, should feel free to do that. I think it would be a scholarly service to put various fakes and false attributions into a catalogue raisonné. Scholars can do so without fear of liability as long as they have the sign-off agreement. Now, that does not address the more general question of whether you can go and say that the Metropolitan Museum is buying is a fake.

SL: Maybe I can address that. . . . Under New York law, as long as you are not defaming the person, the elements of a product disparagement case are as follows:

1. A false statement which disparages or reflects negatively on the quality, condition, or value of property.
2. Publication to a third person.
3. Malice, which is defined as hatred, ill will or spite.
4. Special damages, which means losses causally related having pecuniary or economic value that were caused by the statement.

As long as one of those statements is missing, you are on safe ground in expressing your views. If all the elements are present, then that is the definition of a tort of product disparagement.

RS: It is not quite as simple as that. Unfortunately, hatred, malice, or spite is not going to do it because certainly you could be satisfied that there was no hatred, malice or spite involved. The courts get into issues of irresponsibility, which is a little less of a standard – more of a high degree of negligence standard. Once that issue, which is a factual issue, can get to a jury or a judge, then you've got a potential problem. So, the idea of malice or spite alone being a defense is correct, but it's a little misleading in the practical application. If the plaintiff gets to the jury on the issue of whether or not you were grossly irresponsible, you may have a problem.

PS: I am more conservative. I believe that the authors of a catalogue raisonné should only give opinions when asked and should not go running around volunteering them.

SF: The lawyers have spoken. Just to reiterate what Steven Levy said earlier: the odds of being sued are very slim if your procedures are thorough, your integrity is intact, and your knowledge substantive. But if you are sued, it is expensive.

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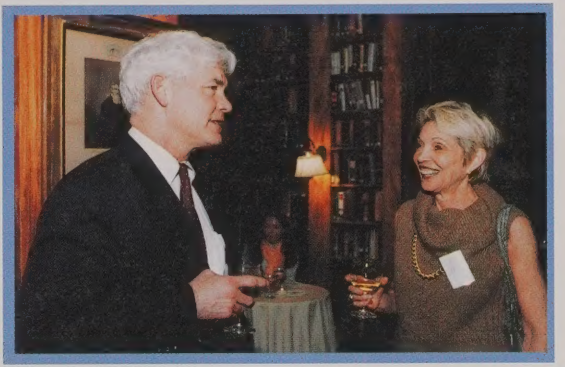
SCENES
FROM THE CONFERENCE

Theodore E. Stebbins, Jr. (left) and Ira Spanierman (right).



Peter C. Sutton and Elin Lake Ewald.

Left to right: Jay Cantor, Greta Meilman, and Hanno D. Mott.

Left to right: Neil Printz, Vivian Endicott Barnett, and John L. Tancock.

IFAR
INTERNATIONAL FOUNDATION FOR ART RESEARCH

The legal panel, Theodore N. Kaplan at the podium.

Left to right: Maurice Tuchman, Grace H. Glueck, and Phyllis Braff.

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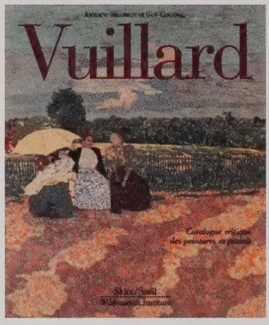
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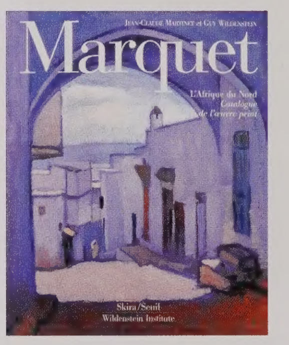
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ETHICS & POTENTIAL CONFLICTS OF INTEREST

JACK COWART, MODERATOR
ARTHUR K. WHEELOCK
BARBARA BUHLER LYNES

SPONSORSHIP AND THE INEVITABILITY OF CONFLICTS

JACK COWART

Because the Roy Lichtenstein Foundation is a partial funder of this conference, I feel obliged to do what we can to support it; I am here as a curatorial sacrifice to the issues. Along with my two fellow panelists – Arthur Wheelock, my colleague of nine years at the National Gallery of Art, who will speak from the viewpoint of a specialist in an institution, and Barbara Buhler Lynes, Curator at the Georgia O'Keeffe Museum and author of the O'Keeffe catalogue raisonné, who will discuss her use and the application and malleability of the College Art Association's Code of Ethics – I hope to outline issues relating to the sponsorship of catalogue raisonnés and conflicts of interest, whether inherent or otherwise. I will do this despite the fact that we at the Lichtenstein Foundation are still at the front edge of launching our catalogue raisonné, so some of my remarks will be projective. I am reminded of the good old days at the National Gallery of Art, when my department commissioned David Anfam to begin the Mark Rothko catalogue raisonné. That project ended up as a magisterial, authoritative catalogue raisonné of a very high order. But I remember living through seven years of institutional ambivalence when dealing with the potential of lawsuits and the issue of warranties the National Gallery might make in our defense if we were ever sued. It was always iffy, and I felt sorry for the author we hired ostensibly for three years, who was still on the case eight and more years later.

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* Jack Cowart, Ph.D., is Founding Executive Director of the Roy Lichtenstein Foundation. Previously, he was Deputy Director / Chief Curator of the Corcoran Gallery of Art and, before then, head of the Department of 20th Century Art at the National Gallery of Art.

SPONSORSHIP

As we have heard at this conference, catalogues raisonnés are another rationalizing reflection of our Euro-American pseudo-scientific and analytic training, in a search for objective elegance and intellectual credibility. They look to add a quantitative weight to counterbalance notions of the generic looseness of the liberal arts. Further, there is a presumed high value stake, in that a respected catalogue raisonné confers expertise and authority on its author and immortality on its artist. In our secular art historical liturgy, the authors, the sponsors and the subject thus rise in a linked triad to some transcendental career summation, or an imperial realm.

> "Conflicts of interest, or self-interest, exist as an undeniable factor . . . But only if such conflicts are acknowledged, can effective countermeasures be employed."

Almost always begun as labors of love, catalogues raisonnés are fragile instruments that are easy to inflect, however subtly. This can result, years later, in a catalogue raisonné that is miles off the original target, well beyond correction or reclaim. We must thus acknowledge that this construct of the "raisonné," which is defined as reasoned, rational, right, just, sensible, argued, considered and weighed, can indeed fall victim to every known aspect of our all-too-human condition.

Conflicts of interest, or self-interest, exist as an undeniable factor, almost like gravity or solar radiation. But only if such conflicts are acknowledged, can effective countermeasures be employed. These typical issues – and we have heard them all – usually revolve around a large subject, which I shall call "Resources and Timing." This is when the excuse-making begins. Always at issue are money, staff, talent, time versus impatience and necessity, process and procedures, complete physical examination requirements, commercial book and art marketing forces, exhibitions, egos, sentiment, honorifics and homage, anniversaries, celebrations, careerism. Also at issue: design schemes to re-coup the investment in the publication, which might distort the "tool" and obscure the scholarly process, thereby transforming the catalogue raisonné into a "happy" book rather than an intensive "index" or open "source."

There can be misplaced attempts by the sponsors, authors, or artist's relations to minimize legal challenges and "hassle" by skirting the hard calls. This is especially true if the artist's work is known to be widely faked or misrepresented but still has a high market value, thus making it worthwhile and lucrative for a so-called "damaged party" to sue for compensation, whether warranted or not. Perhaps we should have a "Catalogue Raisonné Legal Defense Fund"– unworkable, of course – in the same way that we should have a universal "blind trust" to provide "pure" scholarship.

INHERENT CONFLICTS

Despite the superficial appearance of something highly scholarly, employing classical attributes of pure art historical process, erudition, and impartiality, the cohort of typical and inherently conflicted sponsors of catalogues raisonnés includes the following:

- the artist
- the artist's dealer
- other dealers and the commercial sector
- the artist's estate, foundation, widow, other family members
- friends of the artist
- a disenfranchised person or family member seeking legitimacy or favor of the artist or artist's family; perhaps seeking engagement or gifts in gratitude
- collectors or enthusiasts – professional or dilettante – seeking validation
- an entrepreneurial independent researcher
- an academic writing a doctoral dissertation

- museums or other cultural agencies
- book publishers
- publishers of the artist's prints, if he is a printmaker
- independent art historical research foundations.

And then, just for dessert, consider the issue of:

- an intense project leader or scholarly authority, who, as defender of the faith or guardian, clouds his/her objectivity and openness by dodging nonconforming or "messy" data.

All these problems, quirks, conflicts, agencies, and more, have befallen catalogues raisonnés.

I will continue this outline with twelve other questions and observations about sponsorship and potential conflicts:

1) Don't all sponsors of catalogues raisonnés have vested interests, seen and unseen? Logically and otherwise, why would they want to undertake such a numbing and expensive proposition with no chance of a popular book market?
2) The assumed answer to "why" is that there must be something else in this game, of even greater hidden value, to be extracted or distilled by the privileged "insiders."
3) Don't some sponsors or even some compilers, just by their very presence, inadvertently impel owners of art works into not revealing their true holdings, for fear of exploitation, loss of privacy, gossip, or intrigue?
4) What happens when editorial reasoning results in rebalanced facts to better fit a private thesis or skirt issues?
5) What if the author submits to the seduction to "curate" or "critique" and excludes lesser and minor works, or more subtly "edits" the catalogue to present a more positive spin, dumping awkward renegade works into remote appendices, marginalia, or the place we all like most, the hell of footnotes?
6) Can we really assume that no catalogue, past, present or future, will ignore works owned by a person feuding with the family or the artist, or that relate to some indelicacy, whether it's a mistress, illegitimacy, an emotional disorder, a difficult family member, or some other conflicted title?
7) Can we also assume that no catalogue has ever misreported or abridged provenance to protect elusive, secretive or conflicted owners, thus aiming to secure their cooperation?
8) Can we remember stories about privileged or arbitrarily restricted access to private papers, diaries, love letters, inventories, financial records – information hoarded by those perhaps outside the catalogue raisonné, and thus capable of extracting compromise or other favors as a quid pro quo for sharing their information? Or even worse, family or intimate archives split between competing camps, where "deals" have to be cut for and against the objective analysis.
9) What about those people who see the catalogue raisonné as the last opportunity in their lives to play out unresolved personal and emotional conflicts, seeking revenge at this, the most defining of all moments?
10) Isn't the researcher/author of a catalogue raisonné also a "sponsor," and thus someone difficult to neutralize? Baggage comes with all of us, and there is no irradiating machine that can change that.
11) Even when there is a catalogue raisonné advisory committee, which may provide peer review and legal, political, strategic, and other trustworthy and respected support, there are still negatives.
12) The same is true for an artist's foundation, which, while aspiring to be a legitimizing sponsor or co-sponsor, may have baggage and agendas.

Thus, one need always think about what can or should be done to minimize or eliminate the perceived and potential conflicts of interest.

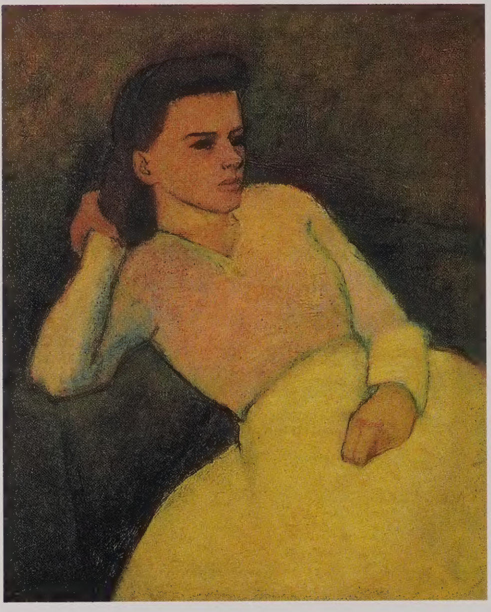

FIGURE 1. Roy Lichtenstein. *Untitled (reclining woman)*, 1942. Oil on canvas, 30" x 25 1/8". Private Collection. © Estate of Roy Lichtenstein.

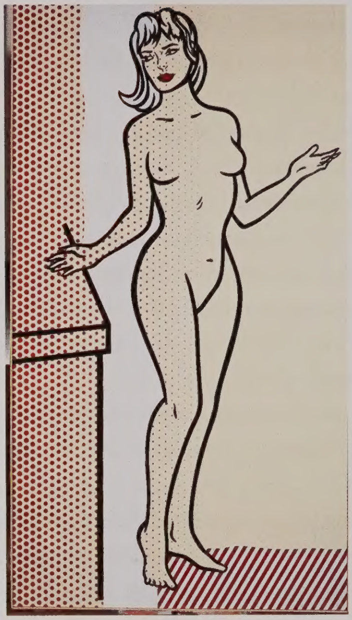

FIGURE 2. Roy Lichtenstein. *Nude,* 1997. Oil and magna on canvas, 82 " x 45". Private Collection. ©Estate of Roy Lichtenstein.

THE LICHTENSTEIN CATALOGUE RAISONNÉ PROJECT

Roy Lichtenstein had several cataloguing projects during his lifetime (1923-1997) and a major one thereafter:

1) In the 1980s at the Free University, Berlin, a Ph.D. candidate, Ernst Busche, established a "beginner," kind of "crypto-catalogue raisonné," of Roy's pre-Pop work of 1942-1960.
2) In the 1990s, an art museum and trade book partnership created for the retrospective of Lichtenstein's prints at the National Gallery of Art resulted in a catalogue raisonné of his prints.
3) Also in the 1990s, a consortium of his dealers, operating in the space provided by Lichtenstein's characteristically amiable nature, launched a catalogue raisonné focused on his High Style Pop 1960s paintings; this project subsequently collapsed under its own weight.
4) When the Roy Lichtenstein Foundation was chartered in 1998, we took on the ultimate task of assembling the comprehensive catalogue of all of Roy's art from all periods - even if it were to take fifteen years (as it might) and the greater part of our assets (as it might), since we will pay for it entirely ourselves. Beginning in 2007, we will publish serially, perhaps first on-line, blocks of data about all these objects.

Thus, the Roy Lichtenstein Foundation has launched a global research program, which, when made available on our Website, would essentially give it away and generally avoid some market forces. We have engaged trained art historians to do the initial sweep by making contact with all the Lichtenstein collectors and dealers and physically seeing each of the 2,500 objects not in the Estate or the Foundation. We trust that these shock troops will prepare the initial platform of documentation, built upon Roy's own studio archive and that of the Leo Castelli registry, as well as the archives of Lichtenstein's principal

> "Don't all sponsors of catalogues raisonnés have vested interests, seen and unseen? . . . . Isn't the researcher/author of a catalogue raisonné also a 'sponsor,' and thus someone difficult to neutralize?"

dealers, and following leads developed by our foundation's oral history program. The Foundation will then research everything else in the Lichtenstein Estate and Foundation and incorporate the work of outside researchers, resulting in the proposed "vertical (multi-media and chronological) catalogue raisonné. Lichtenstein's *oeuvre* changed considerably over the years. Figures 1 and 2, for example, painted fifty-five years apart and among Lichtenstein's earliest and latest works, employ different technical methods but still remind one of his life-long interest in history, observation, handwork, form and symbol, or, as we like to say around the Lichtenstein Foundation (with some astonishment and admiration of this subtle complexity): "Roy is always Roy." The multi-volume catalogue raisonné will give us the opportunity to show both the changes and consistency of his work. As a long-term, private operating foundation we can continue, post initial "publication," to be responsible for revisions, updates, subsequent editions, and adjudicating expertise.

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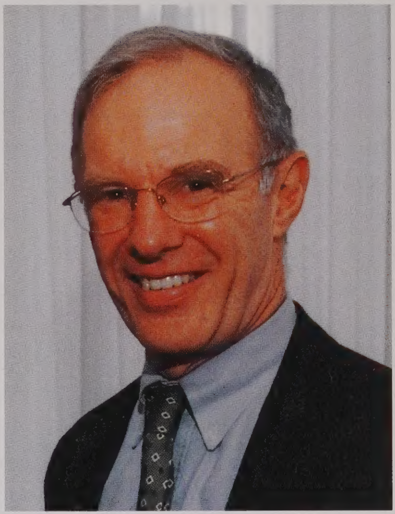
A MUSEUM CURATOR'S PERSPECTIVE

ARTHUR K. WHEELOCK*



Although I have never written a catalogue raisonné, as a curator at the National Gallery I have been the beneficiary of many scholars who have written catalogues. As a teacher at the University of Maryland, I have supervised monographic dissertations that in essence were catalogues raisonnés. These were individual projects undertaken by graduate students with love, energy, and optimism but minimal funding, which, it is important to remember, is the way that the vast majority of catalogues raisonnés in the Old Master field are written. This is a very different situation from the financial backing and other apparatus that Jack Cowart described as taking place at the Lichtenstein Foundation.

"If a painting is started by Rembrandt and worked on by somebody in the studio, is it a Rembrandt? If it is worked up by somebody and touched up by Rembrandt, is it a Rembrandt?"

The Old Masters process, albeit wonderful, has limitations. For one thing, although you encourage the students to see as many of the artist's works as possible, the reality is they are not going to be able to see as many as they should, for financial reasons, if no other. Instead, they will do a lot of photographic research – at the Frick Art Reference Library, at the National Gallery, and at the Rijksbureau voor Kunsthistorische Documentatie (RKD) in The Hague – and they will look at older documents. Another limitation is that a single scholar becomes the sole source of information; there will not be many other scholars to consult with who are working on the same artist. And, even in the best of circumstances, when a great authority such as Seymour Slive works on Frans Hals or when there is a state-sponsored project, such as the Rembrandt Research Project, authors of catalogues raisonnés will not have had the opportunity to live with the works in the same way that a curator in an institution is able to do. The continual exposure to a work of art over time gives the museum curator the opportunity

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* Arthur K. Wheelock is Curator of Northern Baroque Paintings at the National Gallery of Art, Washington, D.C.

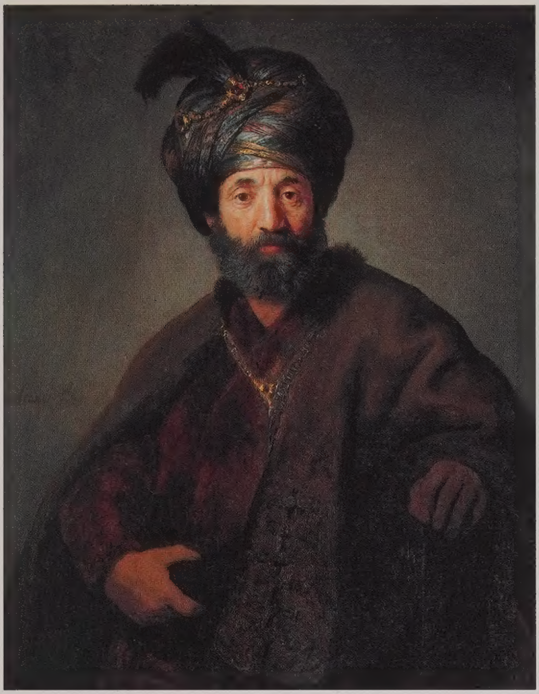

FIGURE 1A. Rembrandt van Rijn and Workshop (probably Govaert Flinck). *Man in Oriental Costume (The Turk)*, c.1635. Oil on canvas, 38 13/16" x 29 5/16" (98.5 x 74.5 cm). National Gallery of Art, no. 1940.1.13. Andrew W. Mellon Collection. Image © National Gallery of Art, Washington.

to get to know an object that is difficult for independent scholars to achieve.

When I came to the National Gallery as a Fellow in the early 1970s, its large collection of paintings by Rembrandt, gifts from the Mellon and Widener collections that had hung on the walls since the Gallery opened in 1940, had never really been studied. At that time, A. B. de Vries, the former director of the Mauritshuis, was at the Gallery as a Kress professor on a small fellowship program that was the predecessor to the Center for Advanced Study in the Visual Arts (CASVA). And it was by listening to his experiences living through the war and working at the Rijksmuseum and the Mauritshuis, and through hearing about his interest in how art had traveled, that I acquired a sense of the history behind the National Gallery's paintings and of the market in relationship to museums.

One of the first things we were able to do together was to look closely at the Vermeers and Rembrandts.

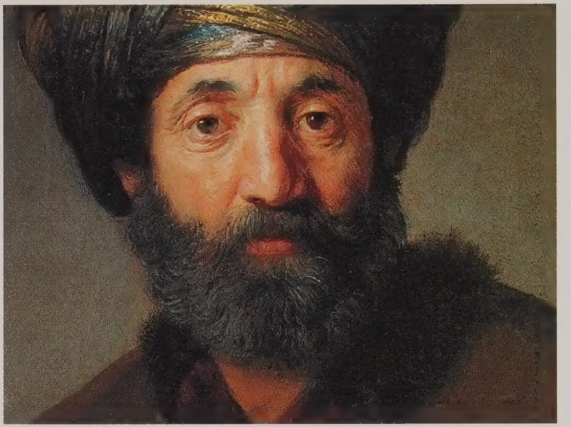

FIGURE 1B. Detail. *Man in Oriental Costume*, c.1635.

This was important because there were many attribution problems. We would close the galleries, and de Vries and I and a conservator would look at paintings like Rembrandt's *Man in Oriental Costume, The Turk* (Figs. 1 A & B) hour after hour, under bright lights and an ultraviolet lamp. In some cases, we were able to take x-rays to examine the underlying structure. Then we would compare our paintings to those in other collections, which enabled us to see them in different ways. Over time we were also able to clean certain paintings, and we began to see things that had not been visible before, such as colors, highlights and accents that had been suppressed under dirty varnish. As one painting was cleaned, we began to see things differently in other paintings.

One of the fascinating things we discovered when we cleaned *The Turk* was that the top half was painted in two very rich layers of paint, which we determined from doing cross-sections, while the bottom half was left unfinished, just blocked in. It is the only example of a Rembrandt painting I know of that is unfinished. You can understand why the Rembrandt Research Project could not decide if it was painted by Rembrandt. What our examination revealed was that while the underpainting had the structure and paint handling characteristic of Rembrandt's technique, the surface of the upper half was probably painted by somebody else in his studio, perhaps Govaert Flinck. In any event, it was a collaboration between the master and his assistant. This discovery, thus, came as a result of a

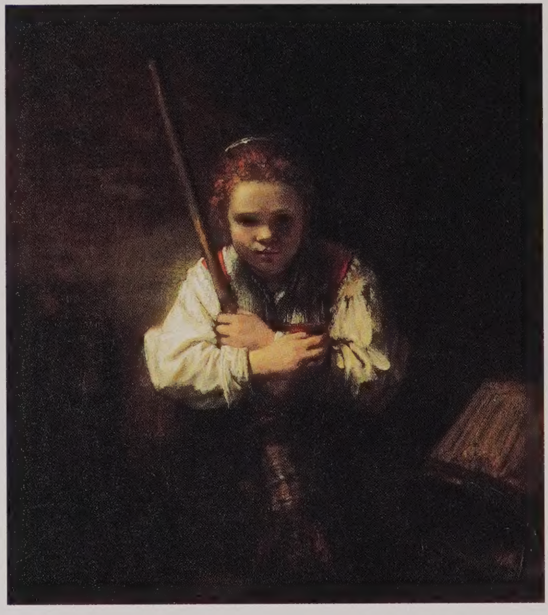

FIGURE 2. Rembrandt Workshop (possibly Carel Fabritius). *A Girl with a Broom*, probably begun 1646–1648 and completed 1651. Oil on canvas, 42 1/4" x 36" (107.3 x 91.4 cm). National Gallery of Art, no. 1937.1.74. Andrew W. Mellon Collection. Image © National Gallery of Art, Washington.

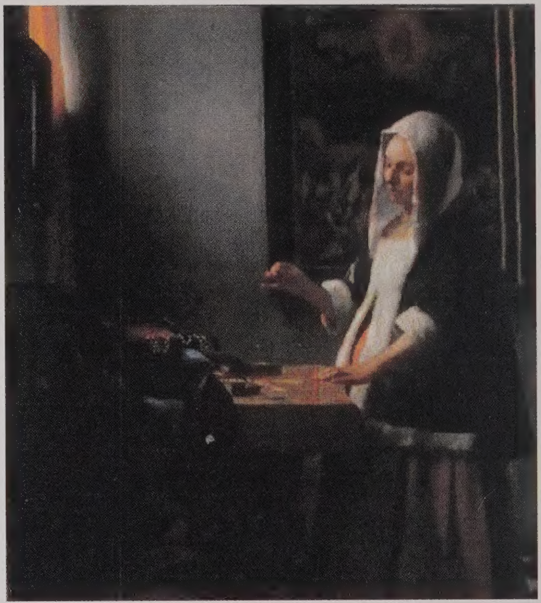

FIGURE 3. Johannes Vermeer. *Woman Holding a Balance*, c.1664. Oil on canvas, 15 7/8" x 14" (39.7 x 35.5 cm). National Gallery of Art, no. 1942.9.97. Widener Collection. Image © National Gallery of Art.

long process that included looking, thinking, comparisons with other works, studying the work of the Rembrandt Research Project, reading the works of earlier scholars such as John Smith and Wilhelm von Bode, and checking archival documents. Moreover, we could not see that *The Turk* was unfinished until it was cleaned, so it was a living, ongoing process of examination.

In addition to *The Turk*, we also examined the *Girl with a Broom* (Fig. 2) in much the same way. Like *The Turk*, I believe the *Girl with a Broom* was done over time by two different artists. Earlier in the conference, we heard that it is easy to say what authenticity is. But I think that authenticity questions for paintings like these are complicated. If a painting is started by Rembrandt and worked on by somebody in the studio, is it a Rembrandt? If it is worked up by somebody and touched up by Rembrandt, is it a Rembrandt?

Over the years, I have been particularly interested in the difficulties encountered when attributing paintings that are the products of large workshops, typical of such artists as Rembrandt, Rubens, and Van Dyck, as well as in the inconsistencies characterizing authentication procedures for these artists. For example, with Rembrandt, if we start to see a different hand or sense a different feeling, we immediately say Rembrandt workshop, whereas in the case of Rubens, paintings from his studio have traditionally been attributed to him alone without question.

In my opinion, the 1995 exhibition at the Metropolitan Museum entitled "Rembrandt Not Rembrandt" asked the wrong question, because for many Rembrandts, it is Rembrandt *and* workshop. Once this is understood, other questions come to mind. What about signatures, for example? Research suggests that Rembrandt signed his own as well as his students' pictures, and, conversely, Rembrandt's students sometimes signed their master's work. Furthermore, some fully authentic pictures have no signatures at all. When such paintings came out of Rembrandt's workshop, were they sold as a Rembrandt or not? We don't know. Trying to resolve how these artists worked and also their relationship to their market and their patrons is a very complicated process.

New discoveries regarding workshop procedures are changing the way today's institutions and private individuals operate. The Rembrandt Research Project, for instance, is reworking its whole structure. At the National Gallery, a system comprising several steps has been devised to deal with attribution changes. Reattributions are presented first to the other curators, then to the chief curator, then the deputy director, the director and, finally, to the Board of Trustees. It is sometimes implied that curators are under pressure to maintain attributions against their better judgment, but I have never come across that attitude at the Gallery; what I have experienced is as close as possible to the ivory tower.

> **"It is more difficult dealing with private galleries and auction houses, where issues are grayer. I have always refrained from giving written comments in such cases because I have not wanted them used and passed around for other people to see."**

In my capacity as curator of Northern Baroque Paintings at the National Gallery, I am obliged to confront issues of authenticity in works of art in two different areas. The first involves pictures in the Gallery's collection. The second involves works in private collections and/or the marketplace, because in the curatorial realm you are, to a certain extent, also a public servant. In these situations you have to balance the interests of the Gallery with those of the private individual, and the interests of the scholar with those of the market – like the woman in Vermeer's *The Woman and the Balance* (Fig. 3), which I think is a wonderful metaphor for the issues one has to work with as a curator. The woman in the painting is placed between the Last Judgment, depicted in the painting in the background, and the worldly treasures in the foreground, and is trying to find the correct balance between the two. As a curator, for example, how can you help an individual? What information can you provide about their works of art?

We try not to be involved with paintings that are about to go on the market, but we cannot always control such situations. Thus, if someone wants us to look at a painting, they can send a photo and, if it looks like something we can comment on, they can bring it to the Gallery. Sometimes we take it to the conservation lab, if there is something to be gained from that type of examination. If we give an oral opinion, the collector is asked to sign a release form that protects the individual curator and the Gallery from legal claims of the sort that were discussed earlier. But I always try to emphasize to collectors that any such opinions are based on very swift reactions and are not the same as living with paintings over time or understanding all of the ramifications. We may also advise them to consult other scholars, or to contact conservators if their painting needs restoration. Working with collectors has always been a positive experience, and I have enjoyed it.

It is more difficult dealing with private galleries and auction houses, where issues are grayer. I have always refrained from giving written comments in such cases because I have not wanted them used and passed around for other people to see. But from what I have heard this morning, maybe I should do more of this, particularly as we have a form for written opinions as well, with a disclaimer. Generally, I am more apt to give an oral opinion to somebody with whom I've had a long working relationship and can trust to maintain confidentiality. Our lawyers at the National Gallery would probably think that is not the way I should do it, and I understand that this is a gray area. But things are changing. For example, the Gallery has changed its policy regarding my participation on the vetting committee of the annual fine arts fair in Maastricht. For years I was told that serving on the committee was not permissible because Maastricht was a market event and the Gallery likes to remain apart from the market. Now my participation is considered a public service rather than a way of helping dealers sell their works of art, although of course it does that too. So in the last couple of years, I have been encouraged to participate, the rationale being that vetting protects individual buyers from acquiring art with faulty attributions or condition problems. There is, thus, a changing relationship with the market, guided by the Gallery's structure and restrictions. Before any dealings with the market, I speak directly to our executive officer, in my case the chief curator, to be sure that he feels it is in the best interest of the Gallery to do so.

Over the years, I have organized a number of monographic exhibitions. Certain parallels exist between the types of problems encountered in such exhibitions and those in publishing a catalogue raisonné. For example, the inclusion of a work in an exhibition or catalogue when its authenticity has previously been questioned can change the public's perception of its authenticity. For the most part, however, we try to exhibit the best possible examples of an artist's work and, thus, tend not to deal with problem pictures. If a work is on the market, or likely to go on the market, its inclusion in an exhibition can affect its value, so we try to avoid including such works unless they are very important to the show.

> "If a work is on the market, or likely to go on the market, its inclusion in an exhibition can affect its value . . . "

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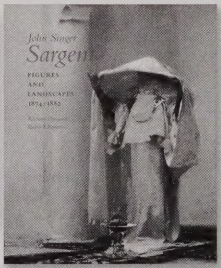

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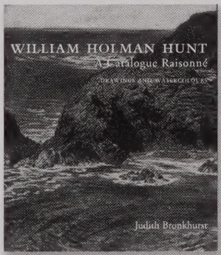

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GEORGIA O'KEEFFE CATALOGUE RAISONNÉ AND THE CAA'S CODE OF ETHICS FOR ART HISTORIANS

BARBARA BUHLER LYNES*

In early 1992, the National Gallery of Art and The Georgia O'Keeffe Foundation announced their joint sponsorship for the research and publication of a catalogue raisonné on the art of Georgia O'Keeffe. In June of that year, I was asked to be its author, and for the next six and one half years, I worked as an independent contractor for both institutions. During this period, The Henry Luce Foundation and The Burnett Foundation provided additional support for the project, which I completed in December 1998, and the catalogue was published in November 1999 by Yale University Press.

> "Many individuals were frustrated by a process that would not allow their work to be authenticated during the research phase of the catalogue project."

By the time I began working on the catalogue, I had been writing about art and teaching art history at the college level for fourteen years. Since the mid-1980s, my scholarly interests had focused on the life and art of O'Keeffe, and by 1992, I had written two books and several articles on the artist. Because hundreds of works by O'Keeffe had been bought and sold through dealers and auction houses since 1917, when the first sale of an O'Keeffe picture occurred, it was obvious to me that the research phase of the catalogue project, which involved discovering the current locations of all of her work, would draw me for the first time into the specific space to which the subtitle of this symposium refers: "Where the Ivory Tower Meets the Marketplace."

Through my earlier writing projects on O'Keeffe, I had become acquainted with the difficulties of working on an artist whose images are highly sought after and highly valued, and I suspected that the politics of compiling the first catalogue raisonné on

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* Barbara Buhler Lynes, Ph.D., is Curator, Georgia O'Keeffe Museum, The Emily Fisher Landau Director, Georgia O'Keeffe Museum Research Center, and the author of *Georgia O'Keeffe Catalogue Raisonné*, 2 vols. (New Haven: Yale University Press, 1999).

O'Keeffe's works – some of which sell for millions of dollars – would be similar, if somewhat more complicated. But I was surprised to discover the byzantine nature and the dramatic complexity of the project's politics, some of which related specifically to the issues that this afternoon's panel seeks to address: ethics and conflicts of interest.

In what follows, I will first discuss the structure adopted for authenticating works of art for the catalogue project, because I believe it obviated many conflict of interest issues with respect to rendering opinions about the authenticity of the more than 2,500 works of art that I saw, examined, and considered for inclusion in the catalogue. Then, I will describe the politics of two of the countless occasions I encountered in the marketplace while conducting research for the catalogue that raised ethical and conflict of interest issues, one of which placed me in a position of honoring the ethics of the marketplace above those of the practice of art history.

By the time I began the catalogue project, I had been a member of the College Art Association for many years and was aware of its publication: "A Code of Ethics for Art Historians and Guidelines for the Professional Practice of Art History."[1] To refresh the memories of those who are familiar with this publication and to familiarize those who are unaware of it, I cite several pertinent sections of the code's introduction: "One of the primary concerns of the College Art Association as a scholarly organization is the advancement of knowledge. Art historians must be competent researchers; they must also be fully aware of professional conduct and employ ethical practices. . . . Art historians are responsible for carefully documenting their findings and then making available to others their sources, evidence and data. They must guard against misrepresenting evidence and against the offense of plagiarism . . . ." About Conflict of Interest, the Code states: "It is extremely important that an art historian be aware of the potential for conflicts of interest when scholarship and market interests become entangled." And it further points out: "To avoid conflict of interest situations, the College Art Association recommends that art historians set fees for attribution and connoisseurship at a fixed fee reasonable for the services provided rather than at a percentage of the sale price of the work of art."

This aspect of conflict of interest was a moot point from the beginning of the O'Keeffe project because of the mechanism the sponsoring institutions adopted regarding the authentication process. Rather than offering opinions about authenticity for works that I was considering for inclusion in the catalogue, the sponsors believed that the published catalogue should serve as the authenticating tool for the works it included. Certainly, many in the art community prefer that a catalogue raisonné author offer opinions about the authenticity of objects at the time they are considered – during the research phase of the project – but an author's obligations for authentication rest with the project sponsors, as is clear from section XI of the College Art Association's Guidelines for the Professional Practice of Art History, which addresses issues of Attribution: "Art historians should first consult with the institution which employs them to determine whether, and on what conditions or restrictions, the art historian may render opinions with respect to the authenticity of works of art."

"But this was only the tip of the iceberg as far as the ethics of confidentiality were concerned."

Many individuals were frustrated by a process that would not allow their work to be authenticated during the research phase of the catalogue project, particularly those who were not certain as to whether the work they presented to me was or was not by O'Keeffe. I knew, however, that such frustrations would be short-lived. First, the sponsors of the project were entirely committed to its completion and publication, as was I. Second, because O'Keeffe had kept fairly accurate and rather complete records of her output, and because, as author of the project, I was given access to them, I felt it was possible to complete research for the catalogue in the allotted time.

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[1] The College Art Association first adopted A Code of Ethics for Art Historians and Guidelines for the Professional Practice of Art History in 1973 and readopted it most recently in 1995. For the text, see www.collegeart.org/guidelines/histethics.html.

In addition, I believed in the mechanism for authentication that the sponsors had adopted for the project. Indeed, I suspected that offering opinions during its research phase might lead to litigation, which would have taken a great deal of my time, distracted me from my work, and thus, would have compromised timely completion and publication of the catalogue.

I spent the first year of the project seeing and examining the art and archival materials pertaining to O'Keeffe either at The Georgia O'Keeffe Foundation in Santa Fe and Abiquiu, New Mexico, or at the National Gallery of Art, Washington, D.C. By June of 1993, I was ready to initiate the process of seeing and examining works in other collections and made the first of many research trips to New York. I spent the month in New York seeing and examining works in public collections in and around the city, and toward the end of my stay, I began tracking down works owned privately. To this end, I scheduled a number of appointments with dealers who had handled large numbers of works by O'Keeffe over the years and confronted the politics of one of the project's most interesting ethical issues.

During my first appointment, the person in charge asked me: "Who issues your paycheck?" "Why are you asking?" I responded. "Well," the dealer explained, "if I provide you with the names of the private collectors who have purchased O'Keeffe works here, would the sponsors of the project garnish your wages if you refused to provide them with this information?" I was stunned by the question, because in my mind the scholarly process stipulates keeping confidential any information given in confidence. Moreover, I knew that the sponsors of the project were entirely respectful of the scholarly process and would never have asked for access to any information that had been given to me in confidence.

But this was only the tip of the iceberg as far as the ethics of confidentiality were concerned. In addition to having to make confidentiality agreements with dealers and auction houses before I could obtain the information I needed, most private collectors who owned or had owned works by O'Keeffe did not want to be identified by name in the catalogue. Thus, with many, I had additionally to agree to keep their names and the locations of their works confidential. Some were willing to move forward on the basis of verbal commitments of confidentiality, but many insisted on written agreements. In this regard, you can imagine the difficulties of having works photographed by photographers working for the project. That is, I had to ask photographers to sign confidentiality agreements with me and had to present these agreements to the various owners who had insisted on confidentiality, some of whom also made it clear that I had to be present during the process of making the photographs.

As far as the issue the New York dealer had raised about who would have access to the information he gave me, I asked what was needed to make things work. His response was: "I need a letter from the

"As it turned out, however, I was grateful to the marketplace for its demand of a formal letter guaranteeing confidentiality, because the letter became an extremely useful means to my obtaining crucial information with regards to the project."

sponsors of the project, the National Gallery of Art and the Georgia O'Keeffe Foundation, stating that any information I give you about clients will be given in confidence and kept in your own files." At this point, I was very glad that I had decided not to set up either of the two offices that had been offered to me with regard to the project, one at the National Gallery and the other at The Georgia O'Keeffe Foundation, but rather to use my home office, which was then in Baltimore, Maryland. Frankly, I don't think I could have convinced some dealers, private collectors, or auction houses that records kept in any other place could remain confidential.

It took me six months to obtain the needed letter – it should not be surprising that the wheels of government organizations grind slowly – but shortly thereafter, the New York dealers began to cooperate with the project. In fact, toward its end, I came to realize that the bizarre nature of this aspect of the project was less a manifestation of the politics of the marketplace and more related to those of the O'Keeffe world, whose long and bitter history of feuding and litigation between O'Keeffe and those who worked for her continues into the present. As it turned out, however, I was grateful to the marketplace for its demand of a formal letter guaranteeing confidentiality, because the letter became an extremely useful means to my obtaining crucial information with regards to the project. And, it helped resolve other ethical problems.

For example, at several points during the research phase of the project, I was asked by individuals who knew people who wanted works by O'Keeffe whether I could provide them with the names and addresses of current owners of works. If a sale resulted, I was told I would receive a finder's fee. As the author of the catalogue, agreeing to help anyone locate works by O'Keeffe and receiving a fee for it was a conflict of interest, but instead of having to spell this out to those who contacted me, I could refer them to the project's very special issues of confidentiality, which precluded my providing anyone with information about works by O'Keeffe in private collections.

Immediately after the issue of confidentiality arose and was resolved, a catalogue prospectus was prepared and circulated to everyone involved in the project – auction houses, dealers, individuals, and museums. It described the nature and scope of the project and its time-frame, and referred specifically to issues of authentication and confidentiality. On authentication, it stated: "While research is underway, no assertions concerning the authenticity of undocumented works will be made." And about confidentiality, it pointed out: "All files relating to the project are maintained by the author and are available to no one else. The specifications of persons or agencies involved regarding the extent to which they wish to be known as present or previous owners of O'Keeffe works will be strictly honored. If they request anonymity, their identities will not be revealed to any third party by the author, their names will not be submitted to the publishers, and information relevant to their ownership will remain confidential and in the possession of the author after the termination of the project."

"The project's confidentiality needs put me at odds with one aspect of the Colleg Art Association's Code of Ethics . . ."

Indeed, as the O'Keeffe project moved forward, the marketplace became increasingly aware of and respectful of its special characteristics, and many with whom I was in contact with regards to the project indicated their strong approval of the process that had been adopted for authentication. Indeed, although one threat of litigation arose during its research phase (which was handled with the advice of my attorney), no actions materialized then nor have any materialized since the publication of the catalogue.

But by the end of the research phase of the project, I had committed myself to so many verbal and/or written confidentiality agreements that I found myself in a position of not being able to speak or write about certain aspects of my research. In fact, the project's confidentiality needs put me at odds with one aspect of the College Art Association's Code of Ethics: "Art historians are responsible for carefully documenting their findings and then making available to others their sources, evidence and data." However, if the mechanism equating authentication with publication had not been in place from the beginning of the project, and if I had not been able to gain the confidence of the art community through confidentiality agreements, I could never have obtained the wide range of information that made it possible for me to complete Georgia O'Keeffe: Catalogue Raisonné, which authenticates 2029 works by the artist and thus has become a primary resource for the art community on the art of Georgia O'Keeffe.

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ETHICS & POTENTIAL CONFLICTS OF INTEREST Q&A

JACK COWART, MODERATOR (JC)
ARTHUR K. WHEELOCK (AW)
BARBARA BUHLER LYNES (BL)

Q This question is prompted by Arthur Wheelock's comment that cleaning dirty varnish can shed new light on the authorship of a painting. Should it be a requirement that the art work be cleaned or restored before an opinion on authenticity is rendered? And if not, why not?

A **AW:** . . . It isn't possible to make cleaning or restoration a requirement. Many paintings are in private homes. Moreover, one doesn't undertake restoration unless there are real issues because there is a danger of harming the work in the process. Restoration and conservation are also very expensive and time consuming.

Many works at the National Gallery, Rembrandts among others, have not been cleaned in years, and we do our best to work within that restriction. Over time you try to learn what a painting might look like underneath the varnish . . . . If restoration is needed and cannot be done, one should at least comment on the status of the preservation of the work.

Q I have many confidential files from my catalogue raisonné research. It is clear that this is valuable material and that we should be making provisions for it after we cease work. Have the panelists done that?

> "There are ethical implications with dealers in charge of catalogues raisonnés. But if your procedures are clear and you follow them, you build people's confidence, and all those other issues disappear."

A **BL:** After we cease? Period? I'm not in the position right now of having to do anything, but I still have the files and they are still confidential.

Q But what happens to the material when we aren't here anymore? Clearly we need to bequeath files to an institution and make sure they don't just get dispersed.

A **BL:** When I started the O'Keeffe catalogue raisonné in 1992, the Edith Halpert archives – the financial records – at the Archives of American Art were sealed. Halpert died in 1970. After two years of my negotiating with the current heirs of that material, the Archives opened the files, so time might be an issue.

A **JC:** For the Lichtenstein catalogue raisonné, I established a confidentiality requirement for the researchers. It labeled the research work "product" and said that, as the work product of a sponsoring institution, all the files shall be remitted to the institution. As the employer I decided that I could do that. I'm surprised that the National Gallery or some other agency didn't claim the O'Keeffe information – or try to.

BL: In the case of the confidential records, they really can't. Probably, the O'Keeffe Research Center is the logical place for them, and one could see what the longevity issues are . . .

Q **NANCY MOWLL MATHEWS:** I would like to correct Arthur Wheelock's statement about my definition of authenticity. I didn't mean to imply that the answer to the question of authenticity was simple, merely that in the context of catalogues raisonnés and of this conference, the definition is relatively straightforward; that is, the determination of authorship. The "Procedures and Process" panel yesterday addressed the complexities of attribution and how to convey those complexities in a publication. How do you describe authorship when you feel that there are two hands involved, or that your artist's contribution is degraded or buried in the work? . . . Have you figured out a way of encapsulating these complexities into the National Gallery's cataloguing system or your publications?

A **AW:** No, absolutely not. I chaired a College Art Association session some years ago on attribution issues concerning Rembrandt and Rubens. We think of Rembrandt's work as being "hands-on"– the artist's hand in the creation is crucial to a Rembrandt – whereas with Rubens, well, it's just Rubens, it doesn't matter. The different standards that we put on these two artists is interesting, since we really have no evidence of the way they dealt with works of art in their own time . . . .

The catalogue of the Dutch paintings at the National Gallery included an introduction to the Rembrandt section where I discussed the history of Rembrandt attributions up to and including the Rembrandt Research Project. I also discussed the approach I was taking with the attributions of his paintings. It was a long explanation. You can't do that with every artist. I'm writing the Flemish catalogue right now, and I think I should do something comparable with Rubens because I'm quite sure that I'm going to be inconsistent in the way I deal with these two artists. Historically that's where we are with these artists, and to break that pattern is probably more than I can figure out how to do at this point.

Q Barbara, do you accept appraisals of Georgia O'Keeffe's paintings at face value as a statement of authorship?

A **BL:** The appraisal side of the field stems from the marketplace, not the museum or the ivory tower. So, I don't do appraisals. I know appraisers who do very careful research to establish the fair market value of a picture . . . but the bottom line is that nobody knows what a picture is really worth until someone is willing to pay a price for it. Does that answer your question?

Q Yes, but I'm more concerned with the catalogue raisonné process . . . . If an owner submits an O'Keeffe and says that it has been appraised and it's worth such and such, therefore, it must be an O'Keeffe, do you say "Forget all that. We're going to review it on our own and go through the catalogue raisonné process?"

A **BL:** As with every picture, I would deal with the work from the issue of connoisseurship, provenance, and technical matters. The appraisal would mean very little to me if I determined that the work wasn't right and the appraisal said it was right. The appraisal just tries to establish fair market value . . . . One would assume that, if there is a catalogue raisonné, the appraiser would look to see whether the work is included and go forward on that basis. If it is in the catalogue raisonné, then assume it's an authentic work. And if it's not in the catalogue raisonné, contact the expert, if there's any doubt.

JC: The Lichtenstein Foundation has a written form which says: "Thus market value, while it does not and cannot establish authenticity, nonetheless affects and conditions all catalogues raisonnés." The question is: Do catalogues raisonnés frequently get done because the works have a market and, therefore, generate the energy, effort, and underwriting to make it possible to do them? And do the catalogues help in finding new inventory for the marketplace?

BL: I think those issues do and don't relate. Some catalogues raisonnés are done simply because the artist is extremely important. . . . I don't think catalogues raisonnés are produced based on what the artists' works are selling for. It's a scholarly issue. Some people may be doing them to find the works, and some dealers have been accused of that. There are ethical implications with dealers in charge of catalogues raisonnés. But if your procedures are clear and you follow them, you build people's confidence, and all those other issues disappear.

"This morning I heard that a catalogue raisonné is a great residue of provenance information. So I was surprised to hear this afternoon that secrecy of ownership is observed. I question whether that isn't dangerous, and I give as an example artworks that were seized by the Nazis."

Q My catalogue raisonné is sponsored by a dealer . . . The marketplace has been suggested here as being a problem, and dealer-sponsored catalogues positioned as operating under a different set of rules. I'd like to suggest that *everyone* is involved in the marketplace in some way. Museums are not immune to the marketplace. Whether you borrow a picture from a gallery or from a private collector, which is one step away from being on the market after it's been in your exhibition, or an artist's estate or foundation, which is often funding its operations via the marketplace, there is a direct and close involvement between the art market and most areas of scholarly activity that deal with objects. So there's a potential for conflict of interest no matter where you come from. The question is how you address that. Barbara Lynes has suggested that if you make your procedures and criteria clear, nobody can accuse you of violating them, in which case it isn't so important whether a gallery, a museum, or a foundation is supporting the project. It's the quality of the research and scholarship. I think that is what IFAR has been interested in pursuing in these sessions. . . .

A **JC:** When we founded the Lichtenstein Foundation and I came on as the art historian, it was distinct from the estate. I said, "Good. I need know nothing about the market, values, bequests, or appraisals." Actually, I'm getting my second doctorate in the market because it's all webbed up together. We can make no move from the Foundation that isn't impacted or influenced by or connected to the other side because there's not really another side. It is a spherical relationship . . . .

Q As an appraiser, I want to clarify something said earlier. It is not a question. Professional appraisers do not authenticate, but we hope that enough of us have sufficient scholarly background to be able to understand where to get the information we need to place a price on something.

Q Last year IFAR had a conference on the importance of provenance. This morning I heard that a catalogue raisonné is a great residue of provenance information. So I was surprised to hear this afternoon that secrecy of ownership is observed. I question whether that isn't dangerous, and I give as an example artworks that were seized by the

Nazis. The whereabouts of much of that art is still unknown. If the owner of a looted work says you can include my work in your catalogue raisonné, but under no circumstance include my name or where it's located, that would have a very adverse effect upon the recovery of Holocaust art.

There was a major stolen art case concerning a Monet where this was relevant. The original owner, Mrs. DeWeerth, lost her case because the court said she had not done her due diligence to find her painting.[1] Had she gone to the local museum within fifty miles of where she lived, the court said, she would have found the Monet catalogue raisonné, which would have provided the name of the owner from whom she was trying to recover the work many years later. . . .

In your desire to have a comprehensive catalogue raisonné, you may have to maintain secrecy. But since it is to the interest of a collector to have his work included in a new catalogue raisonné, he may have to concede secrecy.

A **BL:** I would have loved to have published the current locations and names of owners, but, in fact, you really do have to defer to the preference of the owner.

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[1] *DeWeerth v. Baldinger* 658 F. Supp. 688 (S.D.N.Y. 1987); Reversed by 836 F.2d 103 (2d Cir. App. Ct. 1987); Cert. Denied by 108 S.Ct. 2823 (1988); Owner Granted Relief from Judgment in 804 F.Supp. 539 (S.D.N.Y. 1992); Reversed by 38 F.3d 1266 (2d Cir. App. Ct. 1994); Cert. Denied by 115 S.Ct. 512 (1994)

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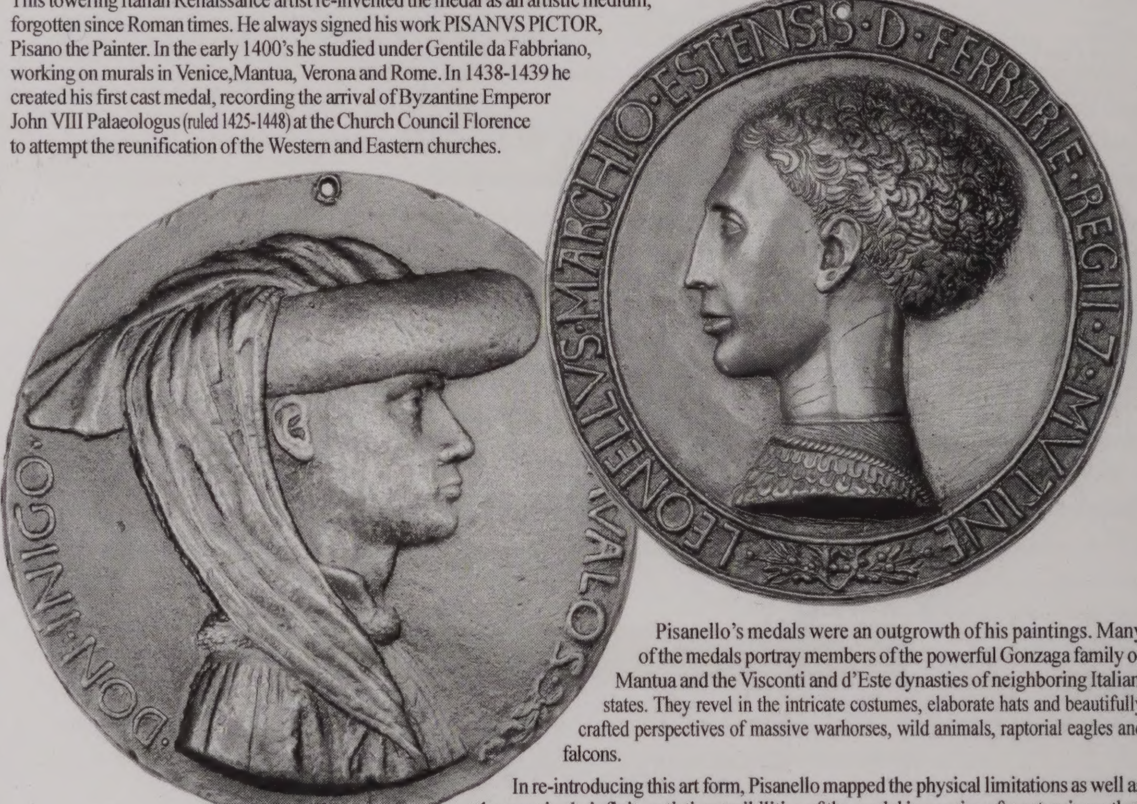

Pisanello's medals were an outgrowth of his paintings. Many of the medals portray members of the powerful Gonzaga family of Mantua and the Visconti and d'Este dynasties of neighboring Italian states. They revel in the intricate costumes, elaborate hats and beautifully crafted perspectives of massive warhorses, wild animals, raptorial eagles and falcons.

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POST-RESEARCH: DEALING WITH THE FIELD

SHARON FLESCHER, MODERATOR
GAIL LEVIN
MICHAEL FINDLAY
THEODORE E. STEBBINS, JR.

IFAR'S CATALOGUE RAISONNÉ SURVEY

SHARON FLESCHER*

INTRODUCTION

Catalogues raisonnés raise issues of continuity and responsibility. Often started as dissertations with the finite goal of a Ph.D., they are, in reality, lifelong activities. Despite the pretense of being definitive, they are merely statements of scholarly knowledge about an artist's body of work at a given moment. Thus, they are endlessly subject to revision as new information comes to light. So what happens when a scholar, authentication board, or committee completes the project and wants to move on? How does that impact the collective investment that the art community has made in that person or team's research, or is it wrong to think of it as a collective investment? Are there provisions for a supplement to the catalogue raisonné? If not, what becomes of the files, notes and ownership records (whether confidential or not) that were gathered during the process? If the material is donated to an archive, the terms of the donation might restrict access for a number of years. Should exceptions be made?

There are also marketplace implications – the subtext of this conference. Authenticity is, indeed, where "the ivory tower meets the marketplace." What pressure, if any, does the marketplace put on the specialist to render a definitive or hasty opinion? What if that opinion later changes? Is it appropriate for the specialist to charge a fee for the opinion? If "yes," should a distinction be made between an opinion on authenticity and the review of a work submitted for inclusion in a catalogue raisonné?

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* Sharon Flescher, Ph.D., is Executive Director of IFAR and Editor-in-Chief of the *IFAR Journal*.

IFAR is not a disinterested party in this issue. In some respects we straddle two worlds. Since our inception in 1969, we have administered an Art Authentication Research Service, which draws upon our Art Advisory Council and a network of scholars, connoisseurs and technical specialists around the world. We know first-hand the challenges surrounding the authentication process and the work involved in producing a catalogue raisonné. But the Authentication Research Service cannot function if the greatest specialists, including authors of catalogues raisonnés, won't share their knowledge and insights with us. Thus, although we are a scholarly not-for-profit organization divorced from the marketplace, we, like the marketplace, seek expert opinions.

The next – and last – session will address issues of continuity and responsibility from the perspectives of both the scholar who has produced the research and the dealer who needs it. Then Theodore Stebbins will recap the conference from his unique perspective as a catalogue raisonné author, curator, and, not insignificantly, trained attorney.

Before proceeding, however, I would like to share some quantitative information about catalogues raisonnés gleaned from an IFAR survey designed in conjunction with this conference. It will, ideally, put the commentary from this session, as well as the previous sessions, in a broader and more concrete context.

THE IFAR CATALOGUE RAISONNÉ QUESTIONNAIRE[1]

Considering their importance to the art field, there is a remarkable paucity of information about catalogues raisonnés. Answers to the most basic questions are unknown, such as: how long, on average, they take to produce and how much they cost; what are the decision-making processes for inclusion and exclusion; are works generally examined in person, or only in photographs; are liability waiver forms required; how many authors have faced lawsuits, and, if so, what was the outcome?

To answer these and other questions about catalogues raisonnés and gain insight into the statistical preponderance of experience and procedures, IFAR sent a detailed questionnaire in 2001 to 240 people who had written or were in the process of preparing catalogues raisonnés – from Old Masters to twentieth-century. Ninety responded, many adding handwritten comments. We learned that academics have worse handwriting than doctors! This very respectable response rate (considering the length and detail of the questionnaire) was due, in part, to the promise of confidentiality[2] and the cooperation we received from Jack Cowart at the Council of Artist Foundations and Nancy Mowll Mathews at the Catalogue Raisonné Scholars Association, who encouraged their memberships to respond and also helped formulate some of the questions. We also like to think that the recipients respected IFAR and trusted us with their confidential information.

As with any survey, there were inconsistencies and overlaps; people frequently checked more than one answer to a question even where only one was sought and left other questions blank. Not surprisingly, the responses varied depending on whether the author was an individual scholar or a member of a catalogue raisonné committee. This survey, therefore, is not the final word on the subject. We don't presume to have sufficient data to draw broad conclusions – 90 respondents is too small a number, and the artists represented were disproportionately American or 19th and 20th century European. But it is a start, and to the best of our knowledge, the only statistical information extant about the procedures, methodologies, aftermath, and risks concerning the writing of a catalogue raisonné.

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[1] I would like to thank Isabel Stainow Wilcox and Margot Hensler for their help in tabulating the statistical data.

[2] Several respondents specifically waived their right to confidentiality.

STATISTICAL DATA

Below are highlights from the questionnaire.[3]

A. Respondent Profile

1. If you are preparing / did prepare a catalogue raisonné but are not an artist's studio or estate, are you:

(TOTAL # OF RESPONDENTS = 65; 6 OVERLAP).

A. 13 a committee or individual affiliated with an art gallery?
B. 0 a corporation?
C. 17 a not-for-profit institution?
D. 41 an independent scholar?

(NB. 35 respondents answered "yes" to another question asking whether they represented an artist's foundation or estate. But as there were only 90 total respondents to the questionnaire, 10 apparently viewed themselves in both categories.)

2. What are / were the qualifications of the individual(s) involved in the examination of works of art for your catalogue raisonné / foundation?

(TOTAL # OF RESPONDENTS = 86; MULTIPLE RESPONSES ALLOWED)

A. 83 art historian / academic
B. 48 curator
C. 3 materials specialist / technical expert
D. 26 dealer
E. 18 family member
F. 5 other:
    2 estate executors
    1 archivist
    1 committee of 5
    1 collector

B. Procedures for Examining Works of Art

1. Do you send a questionnaire or data entry sheet for owners to fill out?

(TOTAL # OF RESPONDENTS: 90)

YES 40 NO 49 IN PROCESS 1

2. What type of photography do you require from the owner?

(TOTAL # OF RESPONDENTS: 86. NB. MULTIPLE RESPONSES GIVEN)

A. 61 transparency
B. 58 black and white photograph
C. 24 color photograph
D. 18 color slide
E. 9 do not require photograph

3. Do you view / examine each work in person? *(NB. This question was understood by respondents without the qualifying word "each.")*

(TOTAL # OF RESPONDENTS: 86)

YES 64 NO 22

If "yes,"

a. Do you ask owners to send /bring the work to you?

(TOTAL # OF RESPONDENTS: 61)

YES 37 NO 24

If so, who pays for the shipping?

OWNER 28 CMTE 3

b. **Do you travel to see the work?**

(TOTAL # OF RESPONDENTS: 73)

YES 60 NO 13

c. **Does a materials specialist examine the work as well as connoisseurs / scholars?**

(TOTAL # OF RESPONDENTS: 31)

YES 3 NO 21 SOMETIMES 7

d. Do you remove the work from the frame?

YES 38 NO 14

(NB. The 38 included 17 who "sometimes" remove it from the frame.)

If "no" [Do not examine each work in person],

a. Which works, if any, do you insist on seeing?

Note: This question called for a written response. Many people who answered "yes" to

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[3] Because we are not reprinting all of the questions from the questionnaire for this article, we have renumbered some of them to avoid confusion.

the previous question that they examine "each" work in person, made it clear here that they actually examine only "some" works. A majority of respondents ask to see works that seem "questionable," either because the works were not fully documented, had recently appeared, or had never been seen before. One author specified that she examines works (including sketches) that are inconsistent with the artist's oeuvre and not documented in an exhibition catalogue. Another, currently working on a catalogue, insists on seeing works "when photographs are not enough."

A smaller group insists on examining works that might actually be "genuine." A specialist in 19th century French art, for example, said that he "examines closely the works he is inclined to accept."

An even smaller group said they examine every work possible.

Some specialists had very precise parameters for works they asked to examine in person. One limits the examinations to those works that require an "official" authentication or "definitive" opinion. Another examines anything connected to a dealer or auction house (presumably, but not specified, because they require a definitive opinion for sale).

4. Do / did you submit any works to a laboratory for technical analysis?

(TOTAL # OF RESPONDENTS: 74)

YES 28 NO 46

If "yes,"

a. Which works? (3 who said "yes" to the previous question did not answer)

A. — all
B. 25 only those with specific questions

(NB. The tests included pigment analysis, x-ray, and paper analysis.)

b. Who pays / paid for the tests?

(TOTAL # OF RESPONDENTS: 35. NB. RESPONDENTS INCLUDED PEOPLE WHO DID NOT ANSWER "YES" TO QUESTION 4.)

A. 15 catalogue raisonné / authentication review committee
B. 15 owner of work
C. 5 other (including "done gratis by a museum")

5. If the review procedure is / was the work of a committee, How often does / did it meet?

(TOTAL # OF RESPONDENTS: 24)

A.. 4 once a month
B. 4 once every six months
C. 1 once per year
D. 15 as required or as necessary (varied)

6. Do you require your decisions to be unanimous?

(TOTAL # OF RESPONDENTS: 22)

YES 18 NO 4

NB: Of those that do not require a unanimous decision, one encourages each committee member to write an opinion; another tables the decision until additional research can be completed and the conflict resolved.

C. Legal / Insurance Issues

1. What do you require of applicants who submit works for review?

(TOTAL # OF RESPONDENTS: 38. MULTIPLE ANSWERS WERE PERMITTED.)

A. 27 a statement of ownership
B. 7 a waiver of liability for physical damage to the work
C. 27 a waiver of liability for opinions
D. 10 a fee

NB. Five respondents require liability waivers both for opinions and physical damage. Regarding fees, the range was from "0" to $1,000. Several specialists who are known to charge higher fees, however, did not respond to the question. The respondents who said they charged a fee did not indicate whether the fee was charged only for "authenticating" works or for reviewing them for purposes of inclusion in the catalogue raisonné.

2. Do you provide an opinion expressing whether or not a work was created by the artist?

(TOTAL # OF RESPONDENTS: 68)

YES 60 NO 8

If so,

a. Is it merely "implied" by inclusion or exclusion from the CR?

YES 29 NO 18

b. Is it in writing?

YES 47 NO 6

c. Does it follow a particular format?

YES 25 NO 20

d. Does it provide reasons?

YES 37 NO 14

e. Does it include language developed in consultation with an attorney?

YES 14 NO 35

NB. Several respondents who indicated that they provide an opinion in writing, in fact, merely imply that opinion in a letter saying that "the work will be included" or "cannot be accepted for the catalogue raisonné at this time." One author, an Old Masters specialist, writes a personal letter if requested but indicates that it is not a "formal" statement. Another author provides a photo certificate if the owner requests one.

3. When do / did you provide your opinion about the work?

(TOTAL # RESPONDENTS: 61)

A. 52 at the time of review

B. 9 at the end of the catalogue process

NB. While the majority indicated that they provide their opinion at the time of review, a few people indicated that the opinion has to be specifically sought. Curiously, 4 people answering this question did not answer the previous question regarding opinions.

4. Have you ever been threatened with a lawsuit because of an opinion?

(TOTAL # RESPONDENTS: 72)

YES 24 NO 48

a. If "yes," were you actually sued?

(TOTAL # RESPONDENTS: 23)

YES 3 NO 20

NB. This answer was of particular interest to IFAR. Of the 3 who indicated that they were sued, one suit was withdrawn; a second was pending at the time of the conference and later dropped; and the third (we are permitted to say) was the Pollock-Krasner Foundation, which was sued three times. Two of those suits were dismissed, and the third was decided in favor of the Foundation. (See article, this issue, by Ronald Spencer.) Thus, of 72 respondents, no one was successfully sued.

5. Do you carry liability insurance for opinions?

(TOTAL # OF RESPONDENTS: 61)

YES 7 NO 54

D. Questions Relating Specifically to the Preparation / Publication of a Catalogue Raisonné

1. Is / was your catalogue the first one published on your artist? (TOTAL # OF RESPONDENTS: 84)

YES 61 NO 23

2. When was the catalogue begun and completed?

(TOTAL # OF RESPONDENTS: 70)

NB. The responses to this question varied enormously and had to be culled from frequently lengthy comments. The shortest amount of time to complete a catalogue was three years. At the other end of the spectrum were two catalogues that took more than 60 years; both were started by scholars who died during the process, which was taken over by others. Another catalogue, in the works for 46 years at the time of the questionnaire, is still not completed. More than a dozen other respondents were working on their catalogues for over 20 years (although in a couple of cases the writers were including the time in between original publication and a supplement); twenty catalogues were taking (or had taken) 10 - 20 years to complete; and twenty-eight involved less than 10 years at the time of the survey.

3. How many volumes was your catalogue raisonné, or how many volumes do you anticipate?

(TOTAL # OF RESPONDENTS: 75)

1 VOL.	2 VOL.	2-3 VOL.	3-5 VOL.	6+ VOL.	UNCERTAIN
31	21	7	7	2	7

4. What database program are you using / did you use to store information on your artist?
(TOTAL # OF RESPONDENTS: 64)

NB. Of the eighteen database programs mentioned by respondents (including specially tailored programs), the two most popular were Filemaker Pro (13) and MS Access (10). But many new programs have since been introduced, suggesting that if the Survey were administered today, the responses would be different. Interestingly, 9 respondents said that they did not use any database program; 3 still used file cards.

5. Were the costs for procuring photographs for publication in your catalogue raisonné a problem?
(TOTAL # OF RESPONDENTS: 57)
YES 30 NO 27

6. Will / did you have to hire a professional photographer? (TOTAL # OF RESPONDENTS: 65)
YES 51 NO 14

7. If completed, what was the total cost of your catalogue raisonné? (TOTAL # OF RESPONDENTS: 9)

NB. The few people who responded to this question provided widely varying amounts, ranging from $60,000 to $1.4 million. It is not clear why the disparity was so great, although subsequent responses suggest that those at the low end were referring only to their own out-of-pocket costs.

8. If underway, what is the projected cost?
(TOTAL # OF RESPONDENTS: 16)

NB. Here, too, the range was enormous, from $19,000 to $2.5 million. The latter, more than double the next highest figure, is for a multi-volume catalogue on a major 20th century artist, with numerous color photographs; the former is for a work on a minor Italian Mannerist painter.

9. Who is paying the cost of the catalogue raisonné?
(TOTAL # OF RESPONDENTS: 47. SEVERAL CHECKED MORE THAN ONE CATEGORY)
A. 18 artist's estate / foundation
B. 17 dealer / gallery
C. 4 collector
D. 15 government / foundation grant

10. If funded by a , b, or c above, what procedures, if any, are in place to avoid the perception of conflict of interest?
(TOTAL # OF RESPONDENTS: 16)

NB. Procedures to avoid the perception of conflict ranged from keeping the ownership information confidential, to a written contract shielding the author/ scholar from commercial pressures, to establishing a review committee.

11. Will / does your publication exist in hard copy only? (TOTAL # OF RESPONDENTS: 57)
YES 43 NO 14

12. Are there provisions made for the dissemination and update in electronic form?
(TOTAL # OF RESPONDENTS: 50)
YES 11 NO 31 NOT YET 8

E. Post Publication

1. Have you arranged to store or otherwise safeguard the data collected during the preparation of your catalogue raisonné (for example, ownership information, photographs, opinions) after publication?
(TOTAL # OF RESPONDENTS: 34)
YES 27 No 2 Not yet 5

NB. Several scholars indicated that they had made plans or intended to make arrangements to store their information in a public institution or an artist's foundation. One author specifically mentioned the Archives of American Art, but with a provision to have the records sealed for a number of years. Another scholar, working on a 19th century French Academic artist, expressed frustration that the Frick Art Reference Library did not want all his archives, only the photographs.

2. What provisions did you / will you make for post-publication inquiries about works by your artist?

(TOTAL # OF RESPONDENTS: 65; MULTIPLE RESPONSES)

A.	29	will continue to review works and intend to publish a supplement
B.	10	will continue to review works and post updates on the Internet
C.	28	will continue to review works with no particular future plan in mind
D.	7	will not continue to review works
E.	8	have no follow-up procedure
F.	2	other

3. If you do / will continue to review works, do / will you charge a fee?

(TOTAL # OF RESPONDENTS: 56)

Yes 15	No 41

NB. It is not clear why the "prospective" fees mentioned in this question were lower than those in question (C1d), in this case, ranging from $100 to $500.

CONCLUSION

What do these responses tell us? For the most part they speak for themselves. But a few points can be made. First, a wide variety of specialists work on catalogues raisonnés, and most take a very long time to complete them. Their procedures vary dramatically. Although a few insist on examining every work, some do not review any works in person. Cost for travel is no doubt a factor, especially for individual scholars.

Most scholars have taken measures to protect themselves against liability for giving opinions – requiring owners to sign waiver forms, for example – but very few have insurance. Professional liability insurance (errors & omissions insurance) is sometimes difficult to obtain and generally costly, a problem, here again, for individual scholars. While a few catalogue raisonné authors have been threatened with lawsuits, however, and the risks are real, no one was successfully sued, and the New York court decision in 2000 in favor of the Pollock-Krasner Foundation (*Lariviere v. Thaw*) should provide protection and some measure of comfort for future catalogue raisonné authors in this regard.

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A SCHOLAR'S PERSPECTIVE: THE EDWARD HOPPER CATALOGUE RAISONNÉ

GAIL LEVIN*

IFAR has asked me to speak about "the scholar's position vis-à-vis the public once research for the catalogue raisonné is completed." I have to interpret this charge in the light of my belief that a true scholar, once focused on a project, never completes research, but always maintains an interest in the field and welcomes new discoveries. Thus, I will discuss my post-publication activities as the author of a catalogue raisonné. My catalogue raisonné of Edward Hopper, in three volumes and a CD-Rom, first appeared in 1995, published by W.W. Norton & Co. for the Whitney Museum of American Art.

But then, in February 2001, Norton and the Whitney republished from the catalogue raisonné the two volumes on Hopper's oils and watercolors. For this occasion, Norton and the Whitney disregarded the scholarly foundation of a catalogue raisonné by diminishing my credit as the author. Any author of a catalogue raisonné bears responsibility for determining which works are authentic and therefore included. Yet this republication fails to acknowledge this basic scholarly role. The publishers dropped my introductory essays, to which I hold the copyright; they credit me only for the long essays and brief notes that accompany individual entries. Although six years passed between the two publications and the museum's director added a new introduction, I received no advance notice of publication and no opportunity to comment or update my original volumes, which now bear the reductive label: "Commentary by Gail Levin."

> **". . . the numbers of poor fakes eventually became overwhelming. So was the hostility of a few of the owners when I rejected the authenticity of their find."**

This problematic post-publication history has its roots in the history of the project as it developed. In

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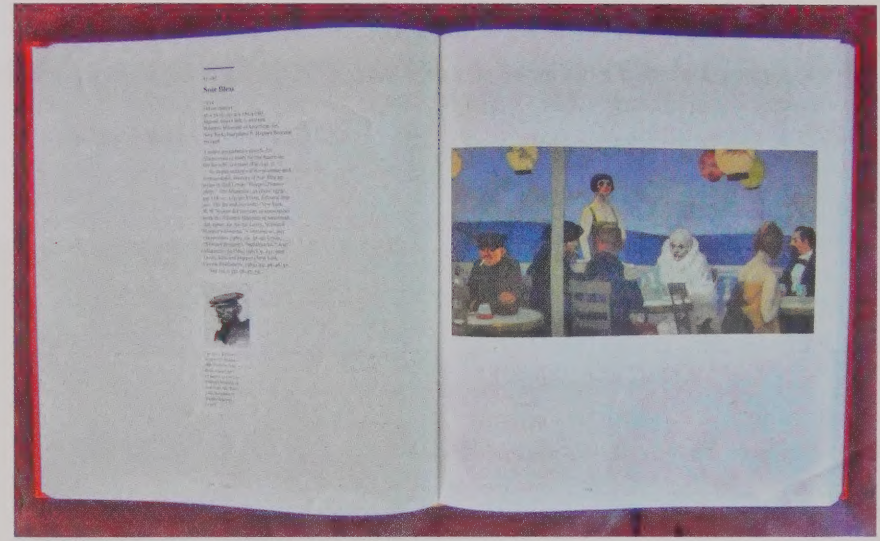

FIGURE 1. The catalogue raisonné entry for Edward Hopper's *Soir Bleu* (1914).

1976, the Whitney Museum of American Art appointed me to be the first curator of the Hopper Collection with the charge of producing a catalogue raisonné and major exhibitions. The catalogue was funded by a grant from The Andrew W. Mellon Foundation. The Whitney had acquired the entire artistic estate of Edward Hopper and his wife, Josephine Nivison Hopper, who was also a painter, by her bequest in 1968, following his death the previous year.

When I began work on the catalogue raisonné, I was still in my twenties. Possessed by an excess of energy, I conceived of the project in the broadest possible terms. A newly minted doctorate gave me confidence. I would employ methodical scholarship to gather and digest in systematic form all that could be known of Hopper's work. No detail was too arcane, no publication too obscure for my venture. My catalogue raisonné would be the definitive work on Hopper: in addition to reproductions of each work of art, I would document every owner (past and present), all exhibitions in which each picture was included, and *every* publication that ever mentioned or reproduced it. I included all specific discussions of a particular work by the artist or his wife in the entries for each object. I also gathered and compiled a comprehensive bibliography that listed any article, exhibition catalogue, or book that even cited the artist or reproduced his work. Additionally, I constructed a detailed chronology of his life and a complete exhibition history listing all of the reviews. I was able to match up unidentified early paintings in the bequest, such as *Soir Bleu* (Fig. 1) of 1914 (published by Lloyd Goodrich as an unidentified café scene), with reviews, titles, and other commentaries from Hopper's forgotten formative years, when he languished in obscurity. I did everything by hand, without computers, which were not yet available to me.

Beginning the project at the museum, I expected to find Hopper's personal papers, including the letters he kept, the photographs, books, and phonograph records that he and his wife owned: in short, the evidence of his intellectual and cultural scope. I searched in vain. Soon I learned that no one from the museum had sought to obtain this material, either directly from Jo after Edward's death, or, later, from the executor of her estate. The opportunity had been missed to conserve basic materials for a history of the artist and his production. This, despite the fact that in 1964, when the Museum was producing the catalogue for the last retrospective exhibition held during Hopper's lifetime, Jo wrote to Margaret McKellar of the Whitney telling her that she and Edward were "pack rats," and had saved everything.

Faced with this lack, I created an archive for the museum. I collected copies of articles, reviews, catalogues, all of the correspondence of the artist and his wife, as well as copies of all interviews with them, as well as memoirs, diaries, and letters mentioning them. I conducted my own interviews with everyone I could find who had known the Hoppers: other artists, his neighbors, his dealer, even the handyman for his building.

By 1984, eight years later, I had completed my basic research for Hopper's oils, watercolors, illustrations, and prints. I had nearly finished dating the thousands of drawings that he produced, and I had identified all of the sketches that led to paintings. For individual works of art of particular interest, I had written extensive essays explaining sources of inspiration, related works, and other significant information. I had also produced four introductory essays: the first analyzed Hopper's critical fortunes; the second was a brief biographical sketch; the third traced his artistic development; and the final essay identified and examined the recurrent themes of his work.

At this time, the museum declared the Hopper catalogue raisonné complete. I returned to the teaching career that I had interrupted for this project, but my life as a scholar had changed forever. I now counted on the opportunity for close study of original works of art. In the process of producing the catalogue raisonné, I had organized two major Hopper exhibitions that drew on many other collections: the first, in 1979, presented all of the artist's prints and his commercial illustrations, the latter seen for the first time ever. The second was a major retrospective of his watercolors, oils, and preparatory drawings that took place the next year. The planning of these exhibitions and the shows themselves provided unparalleled opportunities for studying Hopper's art. My intimate acquaintance with these works grew as I accompanied both exhibitions on extensive itineraries to other museums, monitoring the condition of each object and arranging the presentation of this material in each venue.

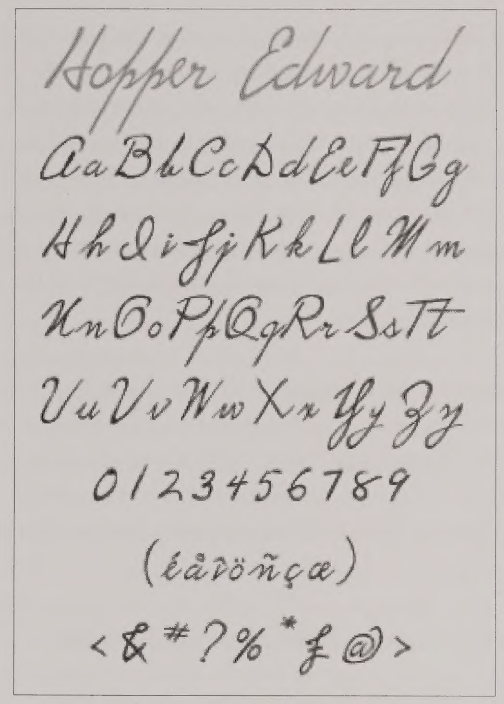

FIGURE 2. The Edward Hopper Font Set.

Towards the end of the eight years that I worked on the catalogue raisonné, I realized that a biography of Hopper needed to be written. Stimulated by the research that I had already done, I was curious to know more. In a private collection, I had turned up voluminous, nearly illegible diaries kept by his wife. Under the pressure of the deadline set by the museum for the catalogue raisonné, I had focused on extracting from the diaries comments about Hopper's paintings. But the more I read, the more I knew that important clues to Hopper's work were buried there amid the tedious recording of shopping lists and other trivial details. I felt compelled to decipher and interpret this new evidence. I knew that I had to write a biography of Hopper. Begun when I left the museum, the biography appeared in 1995, published by Alfred A. Knopf.

Extensive research for the biography enabled me to correct certain errors in the catalogue raisonné manuscript, which remained unpublished for more than a decade. Thus, work on each book added to the strength of the other. The best catalogue raisonné will provide at least a summary of the artist's biography in which to place the work; any worthwhile biography of an artist must feature the creation of the work. In order to understand an artist well, one must become familiar with the full scope of the creative work. To avoid drawing conclusions based upon a work of art that turns out to be a forgery, the biographer needs the expertise of the catalogue raisonné.

Regrettably, both catalogue raisonnés and biographies are also useful to forgers. As I produced exhibitions and publications about Hopper's work, it gained a much larger public and prices escalated dramatically. So did the interest of forgers and those who would fraudulently add an artist's signature to an anonymous work that turns up in the marketplace. In addition, the more costly an artist's work, the more likely that innocent treasure-hunters will delude themselves into thinking that they have found an unsigned original in a flea market or junk shop. These people, some innocent and some not, had already begun to take up my time while I was still working for the museum. While there, I examined all works without charge as a part of the effort to locate all of Hopper's art for the catalogue raisonné. Despite this, I occasionally encountered anger when I rejected an unsigned sailboat or lighthouse without any provenance and stated that in my opinion this work was not by Hopper. During this period, I was able to identify a few of Hopper's lost works, which had turned up in flea markets or estate sales.

> **". . . I was actually subjected to strangers showing up at my home unannounced with art works in tow."**

After I left the Whitney in 1984, in addition to research and writing, both on Hopper and on other subjects, I returned to teaching. I could no longer afford to make myself available to all comers with newly discovered or newly minted works purportedly by Hopper. Yet their numbers continued to grow with his escalating prices and reputation. Since I lived in Manhattan, not far from the Whitney and many commercial art galleries, I was actually subjected to strangers showing up at my home unannounced with art works in tow. They sometimes claimed that they thought I operated a gallery despite the fact that I have never worked in the art market. Others went so far as to ship me originals without contacting me in advance.

Already while at the Whitney, under the guidance of Lloyd Goodrich, I required a signed release form in an effort to protect the museum and myself from lawsuits. I still continue this practice. I have never been sued, although while I worked for the museum, I once served as a witness in a lawsuit against an auction house by the consigner of a fake Hopper. Once working on my own, I began to charge a modest, non-refundable consultation fee for my time and expertise. My fee did not vary whether the art was authentic and worth thousands, even millions, of dollars or fake and worthless.

From 1984 until the publication of the catalogue raisonné, I uncovered a few more authentic works in this way, but the numbers of poor fakes eventually became overwhelming. So was the hostility of a few of the owners when I rejected the authenticity of their find. I was forced to cut down on the numbers of treasure-hunters who would gladly take up my time. Before anyone engages me, I counsel them to conduct their own research at the library, using my books, now especially the catalogue raisonné. Many people, however, do not want to make the effort, and most cannot resist the fantasy of finding an unrecognized treasure. Thus, I have had to continually raise my fees in order to limit the number of preposterous works brought to my attention. I do feel an obligation to keep forgeries off the market, but I also need to protect how I spend my time.

Since publication of the catalogue raisonné and the biography, forgers have become more enterprising. I am convinced that a few have read my biography and invented stories that they imagine I might want to hear. The Whitney Museum gave such people a boost in 1999, when they published the "Edward Hopper Font Set" (Fig. 2). This is a computer program, based on the record books that the artist and his wife kept, which allows one to print out any text in the handwriting of Edward Hopper or that of his wife, Josephine Nivison Hopper. After this, it is a simple matter to trace a note or letter in Hopper's handwriting to go with a story invented by someone who has read the biography.

Not too long ago, I was nearly taken in by one such attempt. The fabricated story was tantalizing, if uncharacteristic, and the art work appeared to be accompanied by an interesting note from Hopper himself. But, fortunately, I came to realize that the painting itself was not at all believeable. Hopper's work is not *that* easy to fake.

Perhaps because my research took so long and was so thorough, I have not needed to change any opinions since publication. No one has challenged my authentications or even the dates or identifying titles that I established in the catalogue raisonné. I myself, however, given the mission of this conference, feel compelled to challenge here publicly for the first time not the authenticity but the provenance for a large group of works that appears in the catalogue. The information as printed is both incomplete and misleading. Instead, many indicators point to a major transfer of works without evidence of clear title from the Hopper Bequest before it reached the museum. When, as an employee, I brought this to the attention of the museum's administrators, to the best of my knowledge, nothing was done, despite the immense loss to the institution and the public. Since I was only a "writer for hire," I did not have ultimate control over what was published about this in the catalogue.

I hope that this brief account of my experiences in writing the catalogue raisonné of Edward Hopper will prove useful for other scholars just starting out on their projects. Because of the problem of funding this kind of in-depth research, the individual scholar must often agree to work for or with a museum, gallery, estate, or other entity that might not share all of the scholar's principles and concerns. The potential loss of control over content is far more crucial to the scholar than any other aspect of the endeavor. Scholars, especially younger ones, might not realize what they are taking on when embarking on a catalogue raisonné. Publication does not make such issues go away; it merely extends and enlarges the scholar's responsibility to the field.

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THE NEEDS OF THE MARKETPLACE

MICHAEL FINDLAY*

My career began in the early 1960s, when there were fewer catalogues raisonnés for the artists with whom I dealt, mainly European artists, 1870 to 1945, and American artists, 1945 to the present. The art market was much smaller then, and trust often replaced research. The dealer trusted his sources, the collector trusted the dealer, and both trusted his own eyes and experience. Mistakes were made and venalities occurred, but litigation was infrequent. In my subsequent twenty years as a dealer (1964-1984) and sixteen as a senior specialist at Christie's (1984-2000), I witnessed not only the publication of many excellent and extremely useful catalogues raisonnés for my field, but also the alarming growth of mistrust and litigation in the art market, as well as the proliferation of hope-springs-eternal attributions, well-made copies and outright forgeries.

> "I firmly believe . . . that ninety-five percent or more of the catalogues raisonnés in use today by the art trade in the fields of 19th- and 20th-century art are reliable."

The existence of detailed and reliable catalogues raisonnés is a boon to the art market. They are in use constantly throughout the day by dealers and auction house specialists, so much so that certain works currently in the market may become referred to simply by their catalogue raisonné number, so that if you say "Wildenstein number 1885," many people will conjure up the image of a particular Monet "Waterlily" painting. Calls are made every day between dealers and collectors mentioning just catalogue raisonné numbers. While the good catalogue raisonné aims to provide a maximum amount of information about a particular work, the fact of its inclusion in the catalogue raisonné is often THE most vital piece of information required by the buyer and seller.

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© Michael Findlay

I firmly believe, based on experience in the field, that ninety-five percent or more of the catalogues raisonnés in use today by the art trade in the fields of 19th- and 20th-century art are reliable. I do not mean they are infallible or totally mistake-free, but that they were created by honest individuals and/or groups of individuals dedicated to completeness and impartiality.

Authors of catalogues raisonnés may insist that they are pursuing purely academic goals, but it would be extremely naive for them to completely ignore the effect of their work in the commercial world. Bluntly put, the inclusion or exclusion of a particular work in a particular catalogue raisonné can have plus or minus consequences to the tune of many millions of dollars. The stakes can be very high.

"Bluntly put, the inclusion or exclusion of a particular work in a particular catalogue raisonné can have plus or minus consequences to the tune of many millions of dollars. The stakes can be very high."

I am not suggesting for one minute that such commercial consequences in any way dictate what must be the purely objective decisions of a catalogue raisonné author. In fact, if they do, that must be an extremely suspect catalogue raisonné. I am suggesting, however, that during the compilation of a catalogue raisonné (we must bear in mind that some have taken more than one generation to complete), the authors manage a fair and expedient way of informing the owners of that artist's work regarding inclusion and exclusion.

In our extremely litigious culture, such authors can be intimidated by the threat of lawsuits – or worse. The November 2001 issue of the magazine *ARTnews* reported that the Wildenstein Institute cancelled the publication of Marc Restellini's catalogue raisonné of Modigliani's works on paper because of, and I quote, "pressures and menaces, including telephone death threats, leveled at the author by art collectors and their representatives."

My personal experience has been that the most savage critics of any specific catalogue raisonné are inevitably people who have paid bargain prices for works with some history of doubt with the hope of bullying specialists and catalogue raisonné authors into accepting them as right, thus providing sizeable profits.

To be fair, though, some years ago I experienced the liability of a half-million dollars because the author of a then-unpublished catalogue raisonné examined a work first hand and gave a verbal commitment that it would be included (and indeed, it was sold twice at auction with that person's *imprimatur*), but the work never made it into the catalogue raisonné, and the author claimed he had never seen it.

Some authors refuse to supply written opinions during the compilation of the catalogue raisonné, and others, like Mr. Restellini, seek to reduce their liability by carefully wording a document. In his case, he provides statements about the inclusion of paintings by Modigliani by indicating simply that "on this day" he will include the work, presumably maintaining the right to change his mind any time until publication.

I sympathize with owners of works that are kept in limbo, deemed neither right nor wrong, for decades during the compilation of a catalogue raisonné. These works cannot be bought or sold nor adequately insured.

On the other hand, the purpose of a work of art transcends its ability to be sold or its usefulness to the owner as an instrument of commerce. Thus, any attention or neglect of it from the ivory tower may impact its value considerably, but that should not dictate the methodology of, for instance, the author of a catalogue raisonné. In my opinion, the greater the distance this methodology seeks to create between the appraisal aspect of a particular work and the pure research regarding its essential nature, character and history, the greater the actual benefit to the market when that catalogue raisonné finally sees the light of day. No such author is completely naive, however, and the fact that the major catalogues raisonnés concern artists with substantial market value simply begs the question.

Beyond the question of exclusion, there are other aspects that can sometimes severely affect the value of a work, and which I would hope all responsible authors take into consideration. Ideally, all works should be given the same prominence in terms of presentation. If some works are given full-page color illustrations while others are shown in smaller, black-and-white images, conclusions will be drawn that the authors deem the works in color more important, and thus more valuable. In fact, they may simply be the works for which color images were available.

A good catalogue raisonné provides a full description of the physical details of a work and its history in the market, all bibliographic references and exhibitions. A great catalogue raisonné contains all of the above, as well as informed commentary possibly linking themes, chronology and the artist's personal history. Such a work is the recently published catalogue raisonné for Cézanne's paintings, the life's work of John Rewald, completed by Walter Feilchenfeldt.

Statements such as the following, however, have ramifications: "Some scholars have wondered whether the painting may possibly have been finished by another hand." Even though the author himself or herself may indicate he or she does not share this opinion, the mere fact of its inclusion can have damning consequences, and the work becomes a pariah in the marketplace. I do not suggest that such remarks are invalid or should be suppressed, but that they render the work suspect and should not be published lightly.

"Some years ago I experienced the liability of a half-million dollars because the author of a then-unpublished catalogue raisonné examined a work first hand and gave a verbal commitment that it would be included . . . but the work never made it into the catalogue raisonné, and the author claimed he had never seen it."

In the time allotted me I have only been able to skim the surface of some of the issues faced when "the rubber meets the road" in the marketplace, but I would like to end on the note on which I began. Most catalogues raisonnés are indispensable tools of the dealer's trade. We profit from them commercially and academically, and they represent part of the trust that can be established between buyer and seller, privately or at auction.

Many catalogues raisonnés also represent a mutually beneficial collaboration between an artist's longtime dealer and the academic world. Such a one is the first volume of the Warhol catalogue raisonné initiated by Thomas Ammann Gallery and edited and advised by distinguished curators and art historians. These are labors of dedication and rarely represent significant financial return for the authors, who nevertheless assume awesome responsibilities; everyone on my side of the fence should be most grateful for this phenomenon. Likewise, the compilers of catalogues raisonnés should realize that the trade represents a tremendous resource of information both historical and contemporaneous. Cooperation between the ivory tower and the marketplace only really comes about in an atmosphere of trust, and trust is best established within the context of personal relationships, not computerized questionnaires.

The dealer who profits most from a particular artist's work is the dealer who is honestly and earnestly dedicated to the work and knowledgeable about the *oeuvre.* For that dealer to be the sole compiler of the artist's catalogue raisonné suggests an obvious conflict of interest, but it only makes good sense for that dealer to be involved as a contributor or supporter of the catalogue raisonné.

To conclude, I'll again address the keys issue of inclusion/exclusion and borrow from Walter Feilchenfeldt's introduction to John Rewald's catalogue raisonné for Cézanne:

> When in doubt, Rewald decided rather to include than to reject. He was guided by the philosophy of the German art historian Max J. Friedländer, whose famous remark he translated as follows: 'It is indeed an error to collect a forgery, but it is a sin to stamp a genuine piece with the seal of falsehood.'

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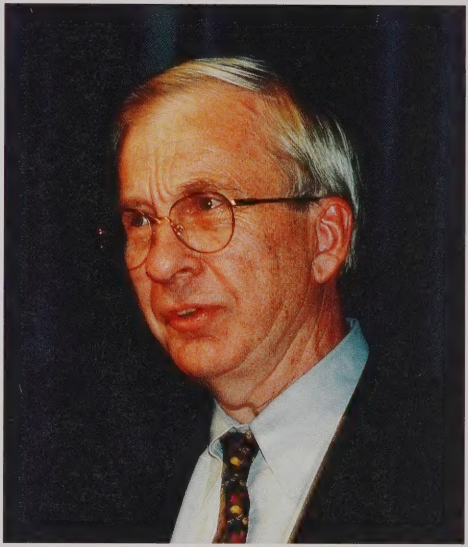
CONFERENCE SUMMATION[1]

THEODORE E. STEBBINS, JR.*



"... Sam Sachs asked, 'Who cares?' It turns out a great many people care about issues of authenticity, and about the content and the methodology of catalogues raisonnés, and they care a lot."

Let me start this summation with my own experience. I majored in political science at Yale, then, naturally, went to law school. By my last year at the Harvard Law School I had gotten bored with law – it involved too much fighting, I thought. I had been introduced to art by a good friend from college, John Heinz, who was an arts and humanities major. Jack, as he was known, took me to the first exhibitions I saw, including the Carnegie International in Pittsburgh. When I got married he brought over an abstract painting for my wife and me to hang in our apartment. A little later, when he came to dinner, he pointed out that we had hung the picture upside down, and, after a good laugh, he gave me my first lesson in looking at art. In a sense, we switched careers: Jack became a Congressman, then a three-term member of the U.S. Senate before his tragic death, and I went into art history.

After finishing law school, I moved a few blocks to the "Fogg" for graduate school at Harvard in the history of art. I should mention that there were no courses given in American art in my two years of residency: my training in the techniques of art history and connoisseurship came at the hands of a group of great teachers including Jakob Rosenberg and Seymour Slive (both of whom taught Dutch 17th cen-

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[1] I would like to dedicate this paper to the late Raymond J. Horowitz. Mr. Horowitz was, at the time of his death at eighty-nine in 2005, perhaps the most respected of all collectors of American art. Ray was known equally for his public service to the Metropolitan and numerous other museums, for his keen eye, and for his helpfulness to other collectors and to scholars in the field. He attended our conference, and I felt pleased and honored that he did so. Secondly, all of us in the field owe our thanks to Sharon Flescher for her leadership of IFAR and for organizing this conference to deal with some of the important questions we face.

"Our field is so lacking in standards or common procedures that we can hardly blame others for finding us confusing and highly subjective."

tury), Max Loehr (Sung Dynasty painting), Sydney Freedberg (Italian Renaissance), and Agnes Mongan (French drawings).

I saw my first painting by Martin Johnson Heade in 1965, near the start of my second year of courses, and was then led to the slim literature on him and, of course, to the core collection of his work, then, as now, the Karolik Collection at the Museum of Fine Arts, Boston. There were very few American paintings hanging in those days at the MFA, and if memory serves, no Heades were on view when I made my first visit. Moved by his work and intrigued by the lack of information about it, I decided to devote my doctoral dissertation to Heade. It seemed natural to me to include in it a catalogue raisonné of his known *oeuvre,* because it appeared obvious that one could not write meaningfully about an artist without knowing as many works as one possibly could.

Catalogues raisonnés were much easier then. There were far fewer publications to check for references, fewer museums collecting in the American field, and far fewer private collectors, curators, and dealers to consult. I finished my thesis in 1971 while teaching at Yale, and included, after an extensive essay, a catalogue of the 381 paintings that I believed to be authentic. It was published by the Yale University Press a few years later. In 2000, I rewrote and republished it. In the second book, I rejected over a dozen works that I had previously included, mainly the famous charcoal drawings of the Newbury marsh, but also a few oils that I concluded I had been wrong about, and added about 238 previously unrecorded paintings that had come to my attention. Given my own experience, I am not very sympathetic to catalogues raisonnés that require decades to complete and that eat up large amounts of funding, or ones that never get finished.

At the start of this conference, Sam Sachs asked, "Who cares?" It turns out a great many people care about issues of authenticity, and about the content and the methodology of catalogues raisonnés, and they care a lot. They have good reason to care, because there is so much more at stake nowadays financially, as well as in terms of one's career, of litigation and liability, and many other ways. We have seen Heade's prices rise by about two thousand times over the last sixty years. (The most Karolik ever paid for a Heade during the 1940's was $2,500, while his major paintings have been valued recently at over $5 million.) Dealers, auction houses, scholars, curators, collectors, agents, lawyers, banks, insurance companies, museum trustees, and the press today all care deeply about the issues we are discussing.

PROCEDURES AND PROCESS

At this conference we have discussed the procedure of the art expert. I can tell you that my own practices changed dramatically in 1980. Before that, the inquirer would send me a color transparency of a work, and like many other specialists I would hold it up to a window, make a decision, and then jot off a letter saying that I accepted the work, or did not. This is what I did with a painting called *Two Hummingbirds and an Orchid.* Sotheby's sent me the photograph during the summer, and after a minute or so I surmised from the photo that it was a typical composition by Heade, and wrote saying so. I kept worrying about this painting, however, so I went to New York on the day of the auction in October 1980. In the minutes before it was to come up, I examined the painting as carefully as I could, feverishly drawing on my visual memory of other Heades. A number of areas in the work seemed uncharacteristic – the surface lacked the painter's usual soft, commalike brushstrokes, the whites of the clouds seemed unusually chalky, and so on. Then I asked the question, "What is there in this work that is absolutely typical of Heade?" In other words, what passages can I find that seem indisputably authen-

"Years ago when prices were low and lawyers disinterested, the fact that the art history field is disorganized to the point of chaos could be seen as charming, Now, it is dangerous."

tic? I could not find any; so with reluctance and embarrassment, I informed the staff that I could no longer stand by my original opinion. I asked them to have the auctioneer announce this when he offered the painting. Interestingly, the owner of the work was in the audience. Sotheby's consulted him, and of course he was outraged, saying that the painting had long been in his Florida family and that he had acquired it many years before from his mother. Since then, I have learned that many people of all kinds lie very easily when it comes to art.

I offered to give the work a complete stylistic and scientific examination at the Museum of Fine Arts, Boston, where I was curator at the time, and I promised to write an apologetic explanation in case the painting turned out to be authentic. We did examine it very carefully, including a pigment analysis by the MFA scientists, and the work turned out to contain several pigments not yet invented in Heade's lifetime, and thus a recent forgery. I was greatly relieved that science corroborated my own feeling about the work, as people – including courts – have a hard time weighing the value of a given scholar's opinion. One can hardly blame them. Our field is so lacking in standards or common procedures that we can hardly blame others for finding us confusing and highly subjective.

"Who are the experts of the future? Connoisseurship is not being taught now in the way we learned it as graduate students."

Other artists started to make imitations of Heade's work during his lifetime, and he had been forged since Karolik discovered him in the 1940's. Thus, as with every artist of note, there are a variety of misattributed works – several generations of them now – that provide grist for the art historian's mill. The orchid composition at Sotheby's in 1980 was the first of a new, and better, series of forgeries to come to my attention. One cannot, in these instances, blame the auction houses, who do the best they can with varying levels of expertise and under great time pressure. It is very much in the interest of the auction houses and the reputable dealers not to sell misattributed works, and most work hard not to do so. So, the expert, the author of the catalogue raisonné, plays an enormously important role as, in effect, the court of last resort in questions of authenticity.

Art experts come in all sizes and shapes. Some are attached to powerful institutions whose legal departments protect them; others are independent scholars who lack insurance, administrative assistance, or any organizational support. Some are well-qualified and have high professional standards, others simply do not. Some work for dealers. Some take fees for their opinions, others don't. Some write letters of "authentication," while others will opine only verbally, and so on. Years ago when prices were low and lawyers disinterested, the fact that the art history field is disorganized to the point of chaos could be seen as charming. Now, it is dangerous.

I believe that we have come to the point where independent or university scholars without recourse to conservators and scientists operate at a severe disadvantage when it comes to judging authenticity.
It seems very useful to have more than one set of eyes making the call on the difficult questions, and there are many times when it is enormously helpful to have the involvement of a conservator who specializes in the work of the artist in question. Several speakers have made this point and have agreed that there are also instances where a scientist who can test the pigments or other materials is indispensable.

Thomas Hoving used to write that he knew instantly, by pure feeling, whether a work was "right" or not, and while it is true that one's first impression of a work counts for a good deal, it is also true that many works of art need to be puzzled out and studied hard over a long period of time. Moreover, to uncover the ever more skillful forgeries that Gail Levin and others have discussed, and to convince a court or dealer of the correctness of one's opinion, requires far more than the single moment of perception. Several speakers have mentioned the fact that certain works are too damaged, or in some other way too elusive, to lead to a definitive opinion either pro or con. I think this is true. We need to acknowledge among ourselves that "I don't know" is an acceptable, professional answer and then persuade the others who care so much – the dealers, collectors, lawyers, and the like – that it is.

> "I do not believe that a museum that owns a Cézanne has the slightest ownership of the right to reproduce the painting. That painting has long been in the public domain."

JUDGING THE EXPERTS

The "Who Judges the Experts?" session, in all honesty, was for me the least satisfactory of the sessions because no answers were suggested. I think there should be. I would like to ask my friend Peter Sutton, for example, more about the Rembrandt Committee and what he *really* thinks about the validity of its procedures and its conclusions.

We, as the experts, are naturally concerned with our own potential liability and other problems. But, think for a moment about the owners of an insecurely attributed work of art. Sooner or later, their inquiries are likely to lead them to the "expert" on that artist, often the scholar who has written or is preparing a catalogue raisonné. If the owners receive a positive response, they have no further problem, but we may.

What if the expert has made a wrong decision? If the scholar has given a positive opinion about an inauthentic work, which happens of course, the artist's *oeuvre* suffers, as does scholarship and the integrity of the field. A few years ago a friend of mine considered buying from a highly reputable dealer a very handsome still-life watercolor attributed to John William Hill. It was convincingly signed, was obviously period, and appeared to be exactly in Hill's manner. It had been "authenticated" by the two leading experts on the American Pre-Raphaelites. However, when I saw it, I felt some misgivings; it just didn't seem to have quite Hill's flavor. The dealer was understanding, and we were able to gather a group of seven or eight accepted Hill watercolors of about the same date and subject in order to take a very close look at them alongside the one on the market. We did so with scholars, conservators, and the buyer and seller together. After a couple of hours of close looking, everyone agreed that the offered work was a fine one, but that its handling, in minute but unmistakable ways, differed from Hill, and that it was probably an English work from the circle of William "Birdsnest" Hunt that had been doctored. However, even when there is no one to play the busybody role that I did in this case, I have noticed that the marketplace is fairly effective, and is likely to discount works bearing wrong opinions by valuing them well below market.

There is an even greater need for a regular appeal process in the opposite cases, where an expert may have unreasonably excluded a work from an artist's *oeuvre.* The owner of such a work can suffer significant damage from having it judged wrongly, yet is essentially helpless. There is no procedure in the field for an appeal beyond the "final word" of a given expert, but there should be, as we all know that mistakes happen since every one of us has made them. This is an area where IFAR could play a very important role.

Finally, on the question of the experts, let me add that I worry about who the experts are going to be in the future. With few exceptions, no one at the conference is under thirty, and very few attendees are under forty. Who are the experts of the future? Connoisseurship is not being taught now in the way we learned it as graduate students. That is a very serious problem as art historians become more and more theoretical, and as the split between museum scholars and ones at the university shows only moderate signs of lessening. This is a major issue that goes far beyond the scope of this conference, but still one that affects our work and our future.

PUBLISHING

It turns out that publishers are very nice people. We learned that from the publishing session, or else IFAR skewed it by choosing two particularly charming publishers. One issue I would love to get into at greater length is that of rights and reproductions. I do not believe that a museum that owns a Cézanne has the slightest ownership of the right to reproduce the painting. That painting has long been in the public domain. The museum may have copyright of the photograph, but I think there's a vast scam going on on the part of institutions claiming exorbitant reproduction fees. We as a field should try to deal with this issue.

> "We need to acknowledge among ourselves that 'I don't know' is an acceptable professional answer and then persuade the others who care so much — the dealers, collectors, lawyers, and the like - that it is."

LEGAL LIABILITY

Regarding legal liability, I have never had a waiver form. I have been sweating ever since that very good conference session. I need a form. I am going to have one drafted immediately. I am going to incorporate. I am going to get insurance. I have never been sued, but I don't want to go back and look at my desk tomorrow.[2]

ETHICS AND CONFLICTS OF INTEREST

Regarding the art market and the dealers, I myself have not felt any anti-dealer sentiment at this conference, contrary to what someone suggested. What I have heard is a lot of discussion that could well lead to another program on the role of the art market in our field. Market pressure is no one's fault, but it is nonetheless true that high prices condition our response. When we carry on our regular professional activities, when we teach, write, and do research, we are, properly, oblivious to the current value of the works under consideration. However, when we are functioning as authors of a catalogue raisonné, as experts, then we recognize that the outside world cares a great deal more about a three million dollar painting or a thirty million dollar one than it does about one worth three hundred or three thousand dollars. High values affect people, and we must not be naïve about this. High values make us all more vulnerable than we used to be – to litigation, to professional criticism, to the press, and the like; high values put pressure on us to professionalize our activities.

As several speakers have said, the potential for conflict of interest is everywhere. There is no question about this. All of us who deal with the market in any way need to be as aware as we can be of potential or perceived conflicts. Dealers very often, at least in my field, are the people who know most about the works of art and who care most. They have a vested interest, but the vested interest is right out front. They want to sell the picture for as much as they can. The more bothersome situations are the ones where you are not quite sure what position the person is playing. The world has gotten more complicated, and many dealers are also excellent collectors, while a number of private collectors also deal themselves,

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[2] Let me add as a postscript that I did in fact change my practice after this conference, and I now use a waiver form. I should also mention the recent publication of a book I believe every scholar and expert will find useful: Ronald D. Spencer, ed., *The Expert Versus the Object: Judging Fakes and False Attributions in the Visual Arts* (New York: Oxford University Press, 2004).

"Catalogues that are simply vehicles for dealing in that artist should not be allowed."

or fund galleries. I should say that dealer-sponsored catalogues raisonnés have always made me nervous, as there is so much potential conflict in that. However, in the American field in recent years, several excellent dealer-backed catalogues have been published; I haven't heard of any problems with conflict, and I know the scholars have gone to great lengths to insulate themselves from their funders. But I would propose that there should be a statute of limitations. When a dealer has been doing a catalogue for a decade or, at the most, fifteen years, if he has not published it, there should be a rule saying "You no longer get to do it. Someone else is now going to do it." That is too long a time. Catalogues that are simply vehicles for dealing in that artist should not be allowed.

POST RESEARCH

Where should scholars – Gail Levin, Barbara Lynes, I, and everyone else – put our papers when we are no longer working with them? We own them, in many cases privately, and we obviously have an obligation to the field regarding their preservation. As a generation of productive scholars ages, this is an important question. It is another issue that I had never thought about until this incredibly useful conference. It still isn't clear to me whether such material is best left to an individual, if you are lucky enough to have someone who is likely to carry on your work, or to an institution.

I have learned a great deal, I have been entertained, and I thank you all. Thank you, Sharon, and IFAR, again, very, very much for hosting us.

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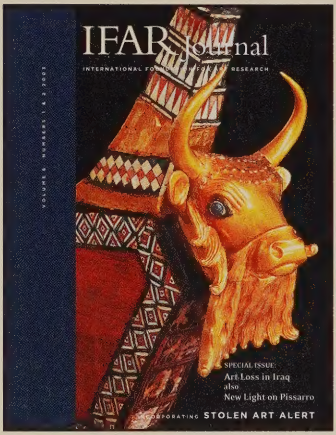
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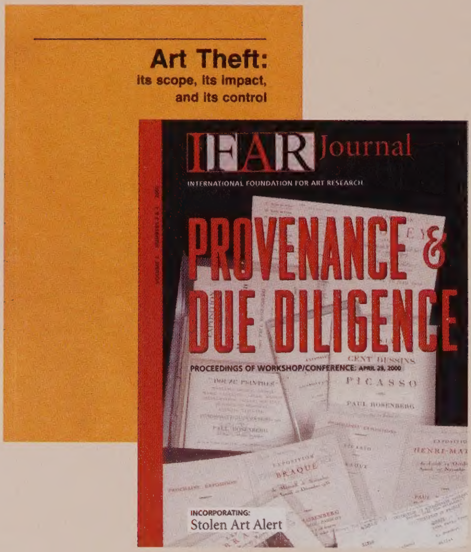
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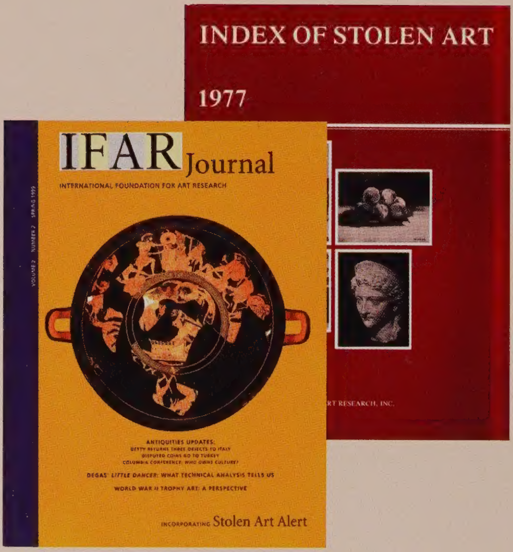
INDEX OF STOLEN ART
1977
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